TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 196.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONERS,

vs.

THE HOME SAVINGS BANK.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 19, 1898.

CERTIORARI AND RETURN FILED APRIL 4, 1898.

(16,000)

(23,585)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 126.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

vs.

THE HOME SAVINGS BANK.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 9, 1914.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1912, of said Court, before the Honorable Elmer B. Adams and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Henry T. Reed, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twenty-third day of December, A. D. 1910, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the District of Colorado, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Board of County Commissioners of the City and County of Denver is Plaintiff in Error, and The Home Savings Bank is Defendant in Error, which said transcript is in the words and figures following, to-wit:

1 Pleas in the Circuit Court of the United States for the District of Colorado, Sitting at Denver.

Be it remembered, that heretofore, and on, to-wit, the thirty-first day of August, A. D. 1909, came The Home Savings Bank by Charles W. Waterman, Esquire, its attorney, and filed in said court its complaint; and sued out of and under the seal of said court a writ of summons against The Board of County Commissioners of the City and County of Denver.

And the said complaint is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Complaint.

Comes now the plaintiff, and complains of the defendant, and for cause of action alleges:

That the plaintiff is now, and at all the times mentioned in the complaint was, a corporation organized and existing under and by

virtue of the laws of the state of Michigan, and is now, and was during all the times herein mentioned, a citizen and resident of the said state of Michigan.

That the City and County of Denver, the defendant herein, is now, and at all the times herein mentioned was, a municipal corporation organized and existing under and by virtue of the constitution and laws of the state of Colorado, and is now, and at all the times herein mentioned was, a citizen and resident of the said state of Colorado.

That the sum or value in dispute in this action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars ($2000.00).

That on or about the 20th day of February, A. D. 1908, the defendant, The City and County of Denver, thereunto duly and fully authorized and empowered by the constitution and laws of the state of Colorado, executed, issued, negotiated and delivered to the
2 Federal Ballot Machine Company (hereinafter called the "Machine Company"), which was then, and ever since has been, a corporation organized and existing under and by virtue of the laws of the state of California, and a citizen and resident of said state of California, its certain negotiable bond or certificate of indebtedness, wherein and whereby the defendant undertook and promised to pay to the order of the Machine Company, at the office of the county treasurer of the defendant, at Denver, Colorado, in one (1) year, the sum of eleven thousand two hundred and fifty dollars ($11,250.00) with interest on that sum from the date thereof at the rate of five per cent (5%) per annum, payable semi-annually, as per two coupons attached thereto; which said negotiable bond or certificate of indebtedness the Machine Company sold, negotiated, transferred, endorsed and delivered to the plaintiff, for value, prior to the 20th day of February, A. D. 1909, and the plaintiff ever since has been, and is now the owner and holder thereof.

That the said negotiable bond or certificate of indebtedness, together with the endorsements thereon, was and is in the words and figures following, to-wit:

$11,250.00. Certificate of Indebtedness No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of eleven thousand two hundred and fifty dollars and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, state of Colorado, on the seventeenth day of February, 1908, and the Board of County Commissioners being authorized thereto by the laws of the state of Colorado, Act of 1905, thereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons,

hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the state of Colorado, by its chairman, and attested by the county clerk and recorder with the seal of the
3 county, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,
By S. D. C. HAYS, *Chairman.*

Attest:
[SEAL.] ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Endorsed: Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Mach. Co., A. Andrew, Vice-Pres't.

That on the 23rd day of February, A. D. 1909, the said negotiable bond or certificate of indebtedness was presented at the office of the county treasurer of the defendant, The City and County of Denver, at Denver, Colorado, and payment demanded, and payment then and there was refused by the defendant, and thereupon, the said negotiable bond or certificate of indebtedness was duly protested for nonpayment, and the plaintiff paid protest fees on account thereof, in the sum of three dollars and seventy-five cents ($3.75).

That the defendant has not paid the said negotiable bond or certificate of indebtedness, nor any part thereof, and the entire principal sum thereof, to-wit, eleven thousand two hundred and fifty dollars ($11,250.00), still remains due and unpaid.

Wherefore, The plaintiff prays judgment against the defendant for the sum of eleven thousand two hundred and fifty dollars ($11,250.00), together with interest thereon from and after the 20th day of February, A. D. 1909; for the further sum of three dollars and seventy-five cents ($3.75) paid by the plaintiff as protest fees, and for costs of this action.

II.

For a Second Cause of Action Against the Defendant, the Plaintiff alleges:

That on or about the 20th day of February, A. D. 1908, the defendant, The City and County of Denver, thereunto duly and fully authorized and empowered by the constitution and laws of the state of Colorado, executed, issued, negotiated and delivered to the Federal Ballot Machine Company (hereinafter called the "Machine
4 Company"), which was then, and ever since has been, a corporation organized and existing under and by virtue of the

laws of the state of California, and a citizen and resident of said state of California, its certain negotiable bond or certificate of indebtedness, wherein and whereby the defendant promised to pay to the order of the Machine Company, at the office of the county treasurer of the defendant, at Denver, Colorado, in one year, the sum of eleven thousand two hundred and fifty dollars ($11,250.00), with interest on that sum from the date thereof at the rate of five per cent (5%) per annum, payable semi-annually, as per two coupons attached thereto.

That the said negotiable bond or certificate of indebtedness was and is in words and figures following, to-wit:

Certificate of Indebtedness.

$11,250.00 No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of eleven thousand two hundred and fifty dollars, and the same having been allowed at a regular meeting of the board of County Commissioners of the City and County of Denver, state of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the state of Colorado, Act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the county treasurer of the City and County of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the state of Colorado, by its chairman, and attested by the county clerk and recorder with the seal of the county, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
By S. D. C. HAYS, *Chairman.*

Attest:
[SEAL.] ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

5 That coupon No. 2, attached to said negotiable bond or certificate of indebtedness when issued and negotiated, and which covered six months' interest upon said bond, became due and payable by its terms, on the 20th day of February, A. D. 1909, at the office of the county treasurer of the defendant.

That in and by said interest coupon the defendant promised to pay to the order of the Machine Company, at the office of the county treasurer of the defendant, on the 20th day of February, A. D. 1909, the sum of two hundred eighty-one dollars and twenty-five cents ($281.25), and said interest coupon was executed, issued, negotiated and delivered to the Machine Company with said bond.

That the Machine Company sold, negotiated, transferred, endorsed and delivered to the plaintiff the said interest coupon, for value prior to the 20th day of February, A. D. 1909, and the plaintiff ever since has been, and is now, the owner and holder thereof.

That the said interest coupon, together with the endorsements thereon, was and is in the words and figures following, to-wit:

On the 20th day of February, 1909, the Board of County Commissioners of the city and county of Denver, state of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the county treasurer of the City and County of Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on certificate of indebtedness No. 1 for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO,
By S. D. C. HAYS, *Chairman.*

$281.25.
2

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Endorsed: Federal Ballot Mch. A. Andrew, Vice-Pres't.

That on the 23rd day of February, A. D. 1909, the said interest coupon was presented at the office of the county treasurer of the defendant, The City and County of Denver, at Denver, Colorado, and payment demanded, and payment then and there was refused by the defendant; and thereupon, the said interest coupon
6 was duly protested for non-payment, and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

That the defendant has not paid the said interest coupon nor any part thereof, and the entire principal sum thereof, to-wit, two hundred eighty-one dollars and twenty-five cents ($281.25), together with interest thereon since the 20th day of February, 1909, still remains due and unpaid.

Wherefore, the plaintiff prays judgment against the defendant for the sum of two hundred and eighty-one dollars and twenty-five cents ($281.25), together with interest on that sum from and after the 20th day of February, A. D. 1909, for the further sum of three

dollars and seventy-five cents ($3.75) paid by the plaintiff as protest fees; and for the costs of this action.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Charles W. Waterman, of lawful age, being first duly sworn, on oath doth depose and says: That the plaintiff is a corporation organized and existing under and by virtue of the laws of the state of Michigan; that affiant is the plaintiff's attorney, by it retained to prosecute this action, and authorized to make this verification, that he has read the foregoing complaint, and knows the contents thereof, and that the matters and things therein set forth are true to the best knowledge and belief of affiant.

CHARLES W. WATERMAN.

Subscribed and sworn to before me this 31st day of August, A. D. 1909. My commission expires April 1st, 1911.

[NOTARIAL SEAL.] J. AUGUSTIN GALLAHER,
Notary Public.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, plaintiff, vs. The Board of County Commissioners of the City and County of Denver, defendant. Complaint. Filed Aug. 31, 1909. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

7 THE HOME SAVINGS BANK, Plaintiff,
versus
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Complaint Filed in the Clerk's Office This 31st Day of August, A. D. 1909.

The President of the United States of America to the Defendant above named, Greeting:

You are hereby notified that an action has been brought in said court, by the above named plaintiff against you as defendant to recover the sum of eleven thousand, two hundred and fifty dollars ($11,250.00) due the defendant on a certain certificate of indebtedness for $11,250.00 issued to the Federal Ballot Machine Company by said defendant on the 20th day of February, 1908, which said certificate was by the Federal Ballot Machine Company duly transferred to the plaintiff; together with interest on said sum from the

20th day of February, 1909, and for the further sum of three dollars and seventy-five cents ($3.75) protest fees paid by plaintiff; also the further sum of two hundred eighty-one dollars and twenty-five cents ($281.25) due the plaintiff from the defendant on a certain interest coupon attached to said certificate of indebtedness, together with interest on said sum of $281.25 from the 20th day of February, 1909, for the further sum of $3.75 protest fees paid by plaintiff; and for costs of this action, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within thirty days (exclusive of the day of service) after this summons shall be served on you, and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit court at the City and County of Denver, in said district, this 31st day of August, A. D. 1909, and of the independence of the United States the 134th year.

[Seal U. S. Cir. Court.]

CHARLES W. BISHOP, *Clerk,*
By ALBERT TREGO,
Deputy Clerk.

8 *Proof of Service.*

UNITED STATES OF AMERICA,
District of Colorado, ss:

DENVER, COLORADO, Sept. 2, A. D. 1909.

I hereby certify, that I received the within writ on the 1st day of Sept. A. D. 1909, and that I have personally served the same upon the said defendant The Board of County Commissioners of the City and County of Denver by delivering to Fred W. Bailey, County Clerk of the City and County of Denver and each of them personally, a true copy of the within writ, at the time and place as follows: As to Fred W. Bailey at Denver, County of Denver on the 1st day of Sept. A. D. 1909.

D. C. BAILEY, *Marshal,*
By E. F. HIGHLAND,
Deputy Marshal.

Endorsed: No. 5388. United States Circuit Court, for the District of Colorado. The Home Savings Bank, Plaintiff, versus The Board of County Commissioners of the City and County of Denver, Defendant. Summons. Filed Sept. 2, 1909. Charles W. Bishop, Clerk. Charles W. Waterman, of Denver, Attorney for plaintiff.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Motion.

Comes now the defendant in the above entitled action, by its attorneys, Milton Smith and Charles R. Brock, and moves the court to strike from the complaint the word "negotiable" as used in line 7, line 14 and line 19, on page 2, line 24 and line 31, on page 3, line 15, and line 23, on page 4, and line 27, on page 5 of said complaint, and also moves the court to strike from said complaint the following language found on page 3 of said complaint, to-wit:

and thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment, and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five ($3.75).

9 And the defendant also moves to strike from the complaint the following language found on page 6 thereof, to-wit:

and thereupon the said interest coupon was duly protested for non-payment, and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

And for ground of this motion the defendant shows to the court, that the use of the word "negotiable" is merely the expression of an erroneous legal conclusion as to the character of the instruments which are the basis of this action, and the word "negotiable" is therefore irrelevant; that it affirmatively appears from the complaint that the instruments sued on are not negotiable, and neither thereof could be legally protested for non-payment, and the allegations of the complaint in respect to the charge and payment of protest fees, which the defendant by this motion seeks to have stricken from the complaint, are wholly irrelevant and immaterial, and are mere surplusage.

MILTON SMITH &
CHAS. R. BROCK,
Attorneys for Defendant.

Endorsed: No. 5388. In the Circuit Court of the United States. The Home Savings Bank, plaintiff v. The Board of County Commissioners, defendant. Motion to Strike Portions of Complaint. Filed Oct. 1, 1909, Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Attorneys for defendant.

Sixtieth Day, May Term, Monday, October 18th, A. D. 1909.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of May, A. D. 1909.

No. 5388.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by Charles R. Brock, Esquire, its attorney, also comes. And the motion to strike out certain portions of the complaint coming on now to be heard is argued by counsel. And the court having considered the same and being now fully advised in the premises:

It is ordered by the court, for good and sufficient reasons to the court appearing, that said motion be, and the same is hereby, denied.

It is further ordered by the court that the defendant answer the complaint herein within twenty (20) days from this day.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Answer.

Comes now the defendant in the above entitled action, and for answer and defense to the complaint states:

I.

For a First Defense.

That it has not and cannot obtain knowledge or information sufficient to form a belief as to whether the Federal Machine Company negotiated, transferred, endorsed or delivered to the plaintiff, for value or otherwise, or at all, prior to the 20th day of February, 1909, or at any time, the bond or certificate of indebtedness in the

complaint mentioned, or as to whether the plaintiff ever since has been or is now the owner or holder thereof, and states that it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether the machine company sold, negotiated, transferred, endorsed or delivered to the plaintiff for value or otherwise or at all, prior to the 20th day of February, A. D. 1909, or at any time, the interest coupon in the complaint mentioned, or as to whether the plaintiff ever since has been or is now the owner or holder thereof.

II.

For a Second Defense.

The defendant alleges upon information and belief, that the plaintiff is prosecuting this action under an agreement with the Federal Ballot Machine Company, or with some one acting in its behalf, but whose name is to the defendant unknown, to the effect that the plaintiff shall be indemnified and saved harmless against the cost and expense of this action, and that the said Federal Ballot Machine Company is the real party in interest in this action.

11 The defendant further alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and laws, and that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute. That it is impossible for an elector, by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is im-

possible for an elector to vote for any particular individual presidential elector. That by the use of said machines it is impossible where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidate, or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote, that said machines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

12 III.

For a Third Defense.

The defendant alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and law, in that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limits of one minute. That it is impossible for an elector, by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector. That by the use of said machines it is impossible, where there are as many as seven tickets, for an elector to vote for an in-

dependent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidate or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote, that said ma-
13 chines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

Wherefore, having fully answered, the defendant prays to be hence dismissed, with judgment for its costs in this behalf expended to be taxed.

MILTON SMITH,
CHAS. R. BROCK,
Attorneys for Defendant.

STATE OF COLORADO,
City and County of Denver, ss:

The affiant, John G. Prinzing, being first duly sworn, on oath deposes and says: that he is chairman of the board of county commissioners of the City and County of Denver. That he has read the foregoing answer and knows the contents thereof, and that the allegations therein made are true to the best of his knowledge, information and belief.

JOHN G. PRINZING.

Subscribed and sworn to before me this 11" day of November, A. D. 1909. My commission expires Feb'y 9, 1913.
[NOTARIAL SEAL.] WILLIAM W. HEINEMAN,
Notary Public.

Endorsed: No. 5388. In the circuit court of the United States. The Home Savings Bank, plaintiff, v. The Board of County Commissioners, defendant. Answer. Filed Nov. 11, 1909. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Attorneys for defendant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Demurrer to the First, Second, and Third Defenses of the Defendant's Answer.

Comes now the plaintiff, and demurs to the first defense contained in the defendant's answer, and for grounds of demurrer says that

the said first defense does not state facts sufficient to constitute a defense to the cause of action set forth in the plaintiff's complaint.

14 2nd. The plaintiff demurs to the second defense contained in the defendant's answer, and for grounds of demurrer says that the said second defense does not state facts sufficient to constitute a defense to the cause of action set forth in the plaintiff's complaint.

3rd. The plaintiff demurs to the third defense contained in the defendant's answer, and for grounds of demurrer says that the said third defense does not state facts sufficient to constitute a defense to the cause of action set forth in the plaintiff's complaint.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendants. Demurrer to the First, Second and Third Defenses of the Defendant's Answer. Filed Nov. 22, 1909. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

Forty-first Day, November Term, Wednesday, January 5th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the second day of November, A. D. 1909.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by William H. Ferguson, Esquire, its attorney also comes. And the demurrer of the plaintiff to the answer of the defendant comes on now to be heard, and is argued by counsel, and the court having considered the same and being now fully advised in the premises, it seemeth to the court now here that the first and second defenses of the answer of the defendant are sufficient in law to be replied unto, and that the third defense of the answer of the defendant is not sufficient in law to be replied unto, and so the said demurrer is overruled as to the first and second defenses, and sustained as to the third defense of said answer herein:

15 And thereupon, on motion of the defendant, it is ordered by the court, that it may file herein an amendment to the third defense of the answer within twenty (20) days from this day.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Amended Answer.

Comes now the defendant in the above entitled action, by leave of court first had and obtained, and for amended answer and defense to the complaint alleges:

I.

For a First Defense.

That it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether the Federal Ballot Machine Company, or anyone, sold, negotiated, transferred, endorsed or delivered to the plaintiff, for value or otherwise, or at all, prior to the 20th day of February A. D. 1909, or at any time, the bond or certificate of indebtedness in the complaint mentioned, or as to whether the plaintiff ever since has been or at any time has been, or is now, the owner or holder thereof; that it has not and cannot obtain sufficient knowledge or information upon which to base a belief as to whether the Federal Ballot Machine Company, or anyone, sold, negotiated, transferred, endorsed or delivered to the plaintiff, for value or otherwise or at all, prior to the 20th day of February A. D. 1909, or at any time, the interest coupon in the complaint mentioned, or as to whether the plaintiff ever since has been or at any time has been or is now the owner or holder thereof.

II.

For a Second Defense.

The defendant further alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned has wholly failed. The said instruments were executed in part payment for one hundred and fifty
16 (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and

statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and laws, in that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute. That [*is*] is impossible for an elector by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector. That by the use of said machine it is impossible, where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidate, or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote. That said machines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

Upon information and belief the defendant alleges, that the Federal Ballot Machine Company is now and was at the time of the institution of this action, the beneficial owner of the bond or
17 certificate of indebtedness and the interest coupon in the complaint set forth; that neither thereof was before maturity, or at any time, in good faith and in due course of business negotiated, sold or transferred by the Federal Ballot Machine Company or anyone, to the plaintiff or anyone; that any transfer or delivery thereof, if any transfer or delivery thereof was ever at any time made, was for the sole purpose of enabling the plaintiff in its own name to prosecute this action, for the purpose of thereby defeating the defense which the Federal Ballot Machine Company knew existed as against itself, and of which the plaintiff had notice prior to any alleged negotiation, transfer or delivery thereof to the plaintiff; and that this action is now being prosecuted by the plaintiff in pursuance of an agreement which was made between the Federal Ballot Machine Company and the plaintiff at or prior to any alleged negotia-

tion, transfer or delivery of said writings to the plaintiff for the use and benefit of the said Federal Ballot Machine Company; and that if the plaintiff is now the holder of said bond or certificate of indebtedness or coupon in the complaint described it took the same solely for the purpose of collection, with full knowledge and notice of all the defenses and equities existing between the defendant and the said Federal Ballot Machine Company, and particularly the failure of the consideration for said obligations hereinbefore more particularly alleged, and that the plaintiff is not the real party in interest.

III.

For a Third Defense.

The defendant alleges, that the consideration for the execution of both the certificate of indebtedness and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty (150) voting machines, known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws. That said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do
18 not perfectly or accurately perform the work as required by said constitution and laws, in that in the use of the said machines the secrecy of the ballot cannot be preserved. That the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute. That it is impossible for an elector, by the use of said machines, to vote a straight ticket, mixed ticket or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector by the use of said machines secretly to vote a split or irregular ticket. That the said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein. That their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector. That by the use of said machines it is impossible, where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from

voting for a candidate or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote. That said machines are so constructed that if used at an election said ballots cannot be recounted in case of contest, in the manner and form required and contemplated by law, and are without any value whatever.

Wherefore, having fully answered, the defendant prays to be hence dismissed, with judgment for its costs in this behalf expended to be taxed.

MILTON SMITH,
CHAS. R. BROCK,
Attorneys for Defendant.

STATE OF COLORADO,
City and County of Denver, ss:

The affiant, W. P. Quarterman, being first duly sworn, on oath deposes and says.

That he is chairman of the board of county commissioners of the City and County of Denver.

That he has read the foregoing answer and knows the contents thereof, and that the allegations therein made are true to the best of his knowledge, information and belief.

W. P. QUARTERMAN.

Subscribed and sworn to before me this 12th day of January, A. D. 1910. My commission expires Mar. 6, 1910.

[NOTARIAL SEAL.] WM. WALLIS PLATT,
Notary Public.

Endorsed: No. 5388. In the U. S. Circuit Court for the district of Colorado. The Home Savings Bank, Plaintiff, v. The Board of County Commissioners of the City and County of Denver, Defendant. Amended Answer. Filed Jan. 12, 1910. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Attorneys for defendant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Demurrer to Amended Answer.

Comes now the plaintiff above named, by its attorney, and demurs to the first defense set forth in the defendant's amended answer, and

for grounds of such demurrer says: that the said first defense does not state facts sufficient to constitute a defense to either the first or the second cause of action set forth in the plaintiff's complaint.

II.

The plaintiff demurs to the second defense set forth in the defendant's amended answer, and for grounds of demurrer says: that the said second defense does not contain or state facts sufficient to constitute a defense to either the first cause of action or the second cause of action set forth in the plaintiff's complaint.

III.

The plaintiff demurs to the third defense set forth in the defendant's amended answer, and for grounds of demurrer says: that the said third defense does not contain or state facts sufficient to
20 constitute a defense to either the first cause of action or the second cause of action set forth in the plaintiff's complaint.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendant. Demurrer to Amended Answer. Filed Jan. 19, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counselor at Law, Denver, Colorado.

Fifty-seventh Day, November Term, Thursday, January 27, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the second day of November, A. D. 1909.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by Charles R. Brock, Esquire, its attorney also comes. And the demurrer to the amended answer herein coming on now to be heard, is argued by counsel, and thereupon and on consideration thereof, it seemeth to the court now here that the first and second defenses of the defendant's amended answer are sufficient in law to be replied unto, and that the third defense in defendant's said amended answer is not sufficient in law to be replied unto, and so the said demurrer is hereby overruled as to the first and

second defenses, and sustained as to the third defense of the amended answer herein.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District, Sitting at Denver.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Replication to the Second Defense of the Amended Answer.

21 Comes now the plaintiff, by its attorney, and for replication to the second defense set forth in the defendant's amended answer, says:

Plaintiff denies each and every allegation contained in the second defense set forth in the defendant's amended answer.

Wherefore, The plaintiff prays judgment as prayed for in its complaint.

CHARLES W. WATERMAN,
Attorney for the Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Charles W. Waterman, of lawful age, being first duly sworn, on oath doth depose and say: That the plaintiff above named is a corporation; that he is the attorney for the plaintiff, and authorized to make this verification; that he has read the foregoing replication and knows the contents thereof, and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

CHARLES W. WATERMAN.

Subscribed and sworn to before me this 7th day of March, A. D. 1910.

[NOTARIAL SEAL.] J. AUGUSTIN GALLAHER,
Notary Public.

My commission expires April 1st, 1911.

Endorsed: No. 5388. U. S. Circuit Court of Colorado. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendant. Replication to the second defense of the amended answer. Filed Mar. 8, 1910. Charles W. Bishop, Clerk. Charles W. Waterman, Counsellor at Law, Denver, Colorado.

Forty-third Day, May Term, Tuesday, August 2nd, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day come- plaintiff by Charles W. Waterman, Esquire, its attorney, and the defendant by William H.
22 Ferguson, Esquire, its attorney, also comes. And thereupon comes a jury, to-wit:

Thomas Foster,	Charles E. Levingston,
S. N. Hicks,	E. E. Watts,
Edward M. Cookerly,	Charles W. Linsley,
C. P. Peter,	John G. Jansen,
Charles W. Keith,	J. F. Boynton,
Frederick L. Cretney,	James H. Berryman,

twelve good and lawful men, and they are each duly selected and tried, empanelled and sworn to well and truly try the issues herein joined and a true verdict render according to the law and the evidence. And thereupon, on motion of the plaintiff, it is ordered by the court that all depositions now in the office of the clerk of this court in this case, be opened, published, and filed, which is accordingly done.

And thereupon comes the evidence. And the court having heard the evidence produced herein and being now fully advised in the premises; it is ordered by the court that judgment be entered herein in favor of the plaintiff and against the defendant as upon a verdict of the jury in the sum of twelve thousand three hundred and seventy-four dollars and seventy-six cents ($12,374.76).

Wherefore, it is considered by the court, as upon a verdict of the jury, that the plaintiff do have and recover of and from the defendant the sum of twelve thousand three hundred and seventy-four dollars and seventy-six cents ($12,347.76), its damages by it sustained by occasion of the premises in its complaint herein set forth and alleged, in form aforesaid assessed, together with its costs by it in this behalf laid out and expended to be taxed.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

On this second day of August, A. D. 1910, the same being one of the regular juridical days of the May, 1910, term of this court there being present the Honorable Robert E. Lewis, District Judge,

It is considered by the court, as upon a verdict of the jury that the plaintiff do have and recover of and from the defendant the sum of twelve thousand three hundred and seventy-four dollars and seventy-six cents ($12,374.76) its damages by it sustained by
23 occasion of the premises in its complaint herein set forth and alleged in form aforesaid assessed, together with its costs by it in this behalf laid out and expended, to be taxed.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States.

THE HOME SAVINGS BANK
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Motion for New Trial.

Comes now the defendant in the above entitled action, by its attorneys Milton Smith and Charles R. Brock, and moves the court to set aside the verdict of the jury and the judgment entered thereon and to grant a new trial in the above entitled case, and for grounds of said motion alleges:

1. That the court erred in denying defendant's motion to strike from the complaint the word "negotiable" as used in line 7, line 14, and line 19 on page 2; line 24 and line 31 on page 3; line 15 and line 23 on page 4; and line 27 on page 5 of said complaint.

2. The court erred in overruling the defendant's motion to strike out the following language found on page 3 of said complaint, to-wit:

Thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

3. The court erred in overruling the defendant's motion to strike out the following language found on page 6 of said complaint, to-wit:

And thereupon said interest coupon was duly protested for non-payment and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.

5. The court erred in ruling that the instruments sued on in the complaint were negotiable.

24 6. The court erred in overruling the defendant's motion for a non-suit.

7. The court erred in overruling the defendant's motion for a directed verdict.

8. The court erred in granting plaintiff's motion for a directed verdict.

9. That the verdict is contrary to the evidence, and the judgment is contrary to law.

MILTON SMITH,
CHAS. R. BROCK, AND
WM. H. FERGUSEN,
Attorneys for Defendant.

Endorsed: 5388. In the Circuit Court of the United States. The Home Savings Bank, plaintiff, v. The Board of County Commissioners of the City and County of Denver. Motion for New Trial. Filed Aug. 5, 1910. Charles W. Bishop, Clerk.

Forty-sixth Day, May Term, Friday, August 5th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

At this day comes the defendant by William H. Ferguson, Esquire, its attorney, no one appearing for or on behalf of the plaintiff. And the motion for a new trial of the issues herein joined coming on now to be heard, is submitted to the court, and the court having considered the same and being now fully advised in the premises;

It is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be, and the same is hereby, denied.

And thereupon, on motion of the defendant, it is ordered by the court that it have day *and* to and including thirty (30) days from this day within which to file herein a bill of the exceptions reserved by it upon the trial of the issues herein joined; and supersedeas bond

on writ of error shall be in the sum of fifteen thousand dollars ($15,000).

25 UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for the District of Colorado.

No. 5388.

HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Defendant's Bill of Exceptions.

Be It Remembered, that on the Second day of August, A. D. 1910, the same being one of the juridical days of the regular May, A. D. 1910, term of the Circuit Court of the United States within and for the District of Colorado, sitting at Denver, Colorado, the above entitled cause came on for trial before the Honorable Robert E. Lewis, Judge of said Court, the plaintiff appearing by Charles W. Waterman, Esquire, its attorney, and the defendant by William H. Ferguson, Esquire, its attorney.

And thereupon the jury having been duly selected, empanelled and sworn to try the same, the plaintiff and the defendant to sustain the issues herein on their respective parts, introduced the following oral and documentary evidence, interposed the objections and took the exceptions hereafter noted, to-wit:

Mr. WATERMAN: Plaintiff offers in evidence the original instrument copy of which is set out in the first cause of action, marked Exhibit A, which said Exhibit A is in words and figures as follows:

PLAINTIFF'S EX. A.

Certificate of Indebtedness.

$11,250.00. No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of Eleven Thousand Two Hundred and Fifty Dollars, and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, State of Colorado, on the seventeenth day of February, 1908, and the Board of County Commissioners, being authorized thereto by the laws of the State of Colorado, Act of 1905, hereby issues its Certificate of Indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the
26 sum of Eleven Thousand Two Hundred and Fifty Dollars, with interest on this sum, from the date hereof, at the rate of

five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This Certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the State of Colorado, by its Chairman, and attested by the County Clerk and Recorder with the seal of the County, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
By S. D. C. HAYS, *Chairman.*

[Seal of the City and County of Denver.]

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Written across the face thereof is the following: "Protested Feb'y 23, 1909, for non-payment. Geo. O. Dostal, Notary Public."

Endorsed on the back as follows: No. 1. $11,250.00. City and County of Denver, Colorado, to Federal Ballot Machine Co. Certificate of Indebtedness due February 20th, 19—. Semi-annual interest coupons, $281.25, payable 20th of August and February. Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Mach. Co., A. Andrew, Vice-Pres't.

Which said Exhibit A was admitted in evidence.

Mr. WATERMAN: Plaintiff also offers in evidence the original instrument set out in the second cause of action contained in the complaint, marked Plaintiff's Exhibit D, which said Exhibit D is in words and figures as follows:

PL'FF'S EX. D.

$281.25.

On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, State of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the County Treasurer of the City and County of Denver,
27 Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on Certificate of Indebtedness No. 1 for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
COLORADO,
By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Written across the face thereof is the following: "Protested Feb'y 23, 1909, for non-payment. Geo. O. Dostal, Notary Public."

Endorsed on back as follows: Federal Ballot Mch. Co. A. Andrew, Vice-Pres't.

Which said Exhibit D was admitted in evidence.

Mr. WATERMAN: I now desire to move that the depositions taken in this case may be opened and read.

The COURT: They may be opened.

The deposition of CHARLES HOWELLS COFFIN, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. Will you state your full name, please?
A. Charles Howells Coffin.
Q. Where do you reside, Mr. Coffin?
A. In the City of Chicago, Illinois.
Q. How long have you resided here, approximately?
A. Approximately since 1884.
Q. And you have been engaged in business here?
A. Yes, sir.
Q. Are you acquainted with the corporation, H. T. Holtz & Company?
A. Yes, sir, I am secretary of that corporation.
Q. How long have you been secretary of H. T. Holtz & Company?
A. Approximately nine months.
Q. That is an Illinois corporation, is it?
A. No sir, it is a corporation organized under the laws of the state of Maine.
Q. What is its business?
A. Dealing in municipal, railroad and corporate bonds.
28 Q. And selling bonds on the market?
A. Yes sir.
Q. And you are, as secretary of H. T. Holtz & Company, in charge of its books and papers?
A. Yes, sir.
Q. I draw your attention to a paper which is called "Certificate of Indebtedness, numbered 1," City and County of Denver, State of Colorado, for $11,250, which I will ask the reporter to mark as Plaintiff's Exhibit A. with his initials——

The document was marked, as requested, with the initials "G. G. T."

Q. (Continuing:) —and which now has been marked "Plaintiff's Exhibit A," with the reporter's initials, "G. G. T.," and ask

when you first saw that certificate or any of the series of which that certificate is one (handing same to witness)?

A. In the latter part of March or the early part of April, 1908. I cannot give you the exact date.

Q. That certificate is numbered 1. Were there other certificates in that series?

A. Yes sir, there were ten certificates in all, for a like amount.

Q. For the same amount?

A. Yes, sir.

Q. And all dated the same date?

A. All dated the same day.

Q. What connection did H. T. Holtz & Co. have with these certificates?

A. We were asked to sell these certificates by the Federal Ballot Machine Company.

Q. In pursuance of that request did H. T. Holtz & Company make any effort to sell these certificates?

A. Yes sir, as a matter of fact we did sell all of those certificates.

Q. During the course of that sale did you advertise the certificates anywhere?

A. No sir, not by means of a published advertisement. There were a good many letters, I believe, written to various people about them.

Q. Drawing your attention to these certificates,——

A. Yes sir.

Q. —prior to the sale, and prior to entering upon efforts to effect a sale of them did you submit them to an attorney?

A. Yes sir.

Q. For his opinion upon the certificates?

A. Yes sir.

Q. You always do that in the case of your securities?

A. We always do that. It is a regular matter with us to do that.

29 Q. When the certificates were submitted to you were they accompanied by the opinion of any attorney?

A. Yes sir, they were accompanied by the approving legal opinion of Mr. H. P. Bennett, if I have the initials correctly.

Q. Of the First National Bank of Denver?

A. Of the First National Bank of Denver, Colorado.

Q. I show you a paper which I will ask the reporter to mark Plaintiff's Exhibit B, with his initials,——

The document was marked as requested.

Q. —which has now been so marked, and asked you if that is the opinion which was submitted to you by the Federal Ballot Machine Company on the legality of the certificate? (Handing same to witness.)

A. Yes, sir.

Q. To what attorney or attorneys did you submit the certificates on your part?

A. To Mr. Weber of the firm of Shope, Zane, Busby & Weber of Chicago, Illinois.

Q. And they were submitted on the record of the proceedings had?

A. Yes sir.
Q. And upon that record did you receive an opinion?
A. Yes sir.
Q. I show you a paper which I will have the report- mark Plaintiff's Exhibit C, with his initials——

The paper referred to was marked as requested.

Q. (Continuing:) —which has now been marked "Plaintiff's Exhibit C," and I will ask you if that is the opinion which you received? (Handing same to witness.)
A. Yes sir.
Q. Now, drawing your particular attention to the certificates of this series, numbered 1, which has been marked "Plaintiff's Exhibit A," I will ask you if you know through whom that certificate was sold?
A. This certificate was sold by Mr. Fontaine Le Maistre, and through the firm of Karl R. Davies & Company, brokers, in Detroit, Michigan, to the Home Savings Bank of Detroit, Michigan.

Mr. BROCK:

Q. This certificate you say was sold through whom?
A. By Mr. Fontaine Le Maistre, who was a salesman representing our house.
Q. You say he was your agent at Detroit?
A. He traveled from our Chicago office, yes sir, and he negotiated this sale in Detroit.

30 Mr. ZANE:

Q. In the course of business in regard to the sale of this certificate, Plaintiff's Exhibit A, did you receive any money for the certificate from any one?
A. Yes sir. We were paid for the certificate at the full purchase price by the Home Savings Bank of Detroit.
Q. What was the purchase price?
A. It was a little over 99 and interest. I should have brought the exact figures, but I did not think of it.

Mr. ZANE: We have the exact figures.

Q. You mean 99 cents on the dollar?
A. Yes sir.
Q. And interest?
A. And accured interest to the date of delivery.
Q. At that time the certificate had coupons upon it, had it?
A. Yes sir.
Q. How many?
A. Two.
Q. I show you a paper which I will have marked Plaintiff's Exhibit D——

The paper was marked accordingly.

Q. (Continuing:) —and which has now been marked "Plaintiff's Exhibit D," and I will ask you if that is the second coupon which was on the certificate? (Handing same to the witness.)

A. Yes, sir.

Q. When the certificate, Plaintiff's Exhibit A, was delivered to H. T. Holtz & Co. did it have any endorsement on it?

A. Yes sir, it bore the endorsement of the Federal Ballot Machine Company, by Adam Andrew, Vice-President.

Q. I draw your attention to the endorsement on the back of this certificate, where it says, "Pay to the order of the Home Savings Bank, Detroit, Michigan. Federal Ballot Machine Co. A. Andrew. Vice-president." The endorsement was in blank when it was delivered to you, was it?

A. Yes sir.

Q. And who wrote the endorsee's name?

A. That I don't know.

Q. That you do not know?

A. No sir. When we delivered the certificate to the Home Savings Bank it was endorsed in blank.

Q. A general endorsement?

A. Yes sir.

Q. All of the coupons were endorsed in the same way?

A. Yes sir.

Q. By a general endorsement?

A. Yes sir.

Q. Mr. A. Andrew was the vice-president of the Federal Ballot Machine Company?

Mr. BROCK: I object at this point, on the ground that the last two or three questions are incompetent, and do not constitute the proper method of proving agency.

31 A. Yes sir.

Mr. ZANE:

Q. Did you receive from the Federal Ballot Machine Company any copy of the minutes of a meeting or meetings of the Board of Directors, showing the authority of Mr. Andrews to endorse?

A. Yes sir, we received such a certificate.

Q. I will draw your attention to a paper which I will ask the reporter to mark "Plaintiff's Exhibit E,"——

The paper was marked, as requested, with the initials "G. G. T."

Q. (Continuing:) —and ask you if this is the paper, so marked Plaintiff's Exhibit E,—if this paper is the certified copy of the resolution which was submitted to you? (Handing same to witness.)

A. Yes sir.

Q. In addition to that certified copy of a resolution of the Board of Directors, did you see any other statement of authority from the officers of the Federal Ballot Machine Company, as to the authority of Mr. Andrew, the vice-president, to endorse and dispose of these certificates?

A. Yes sir. We also had a certificate signed by the secretary of the company and the president, stating that Mr. Adam Andrew was authorized to endorse these certificates.

Mr. BROCK: The defendant objects and moves to strike out the statement as to what the paper mentioned by the witness is, and objects to any testimony with respect to said paper, on the ground that it is immaterial, but does not interpose an objection on the ground that the paper is a copy, and not the original.

Mr. ZANE: I will ask the reporter to mark this paper which I hand him, Plaintiff's Exhibit F.

The paper is marked as requested.

Q. Referring to this paper which has been marked Plaintiff's Exhibit F, I hand you that paper and ask if that was the paper submitted to you, also showing the authority of Mr. Andrew? (Handing same to witness.)

A. Yes, sir.

Q. Were these opinions of counsel and the papers showing the authority of Mr. Andrew to endorse, submitted to the Home Savings Bank before its purchase?

A. Yes sir.

Q. Did you pay the Federal Ballot Machine Company for this particular certificate, Plaintiff's Exhibit A, separately from payment for the other certificates in the series?

A. Yes sir.

Q. Have you the check?

The witness produces the check and handed it to counsel.

32 A. Yes sir.

Q. This check which you have produced is produced from the records of H. T. Holtz & Company?

A. Yes, sir.

Q. It is one of its cancelled checks?

A. Yes, sir.

Q. Returned to H. T. Holtz & Company from its bank?

A. Yes sir.

Mr. ZANE: I will ask that the reporter mark this check Plaintiff's Exhibit G,——

The check was marked as requested.

Q. This is the check that paid for the certificate, Plaintiff's Exhibit A?

A. Yes sir.

Q. And for that certificate you were paid by the Home Savings Bank in Detroit?

A. We were paid by the Home Savings Bank in Detroit, yes sir.

Q. That check was delivered on its date, June 22, 1908?

A. Yes sir.

Q. And paid through the Chicago Clearing House June 24, 1908?

A. Yes sir.

Q. The Federal Ballot Machine Company has an account at the Continental Bank of Chicago?

A. I so understand, yes sir. The certificates were deposited there by the Federal Ballot Machine Company so that we could get them when we sold them.

Cross-examination.

By Mr. BROCK:

Q. You say you have been secretary of H. T. Holtz & Company for about nine months?

A. Approximately, yes sir.

Q. You were not secretary at the time of the transaction to which you have referred?

A. No sir, I was manager of the municipal bond department.

Q. In your efforts to sell this certificate to which you have referred in your direct examination, I believe you said you made no advertisement at all?

A. No sir. I might add that that is not usual in such cases.

Q. Where was the deal closed between Holtz & Company and the Home Savings Bank? At Detroit or in Chicago?

A. The transaction was closed in Detroit.

Q. You were not in Detroit at all?

A. I was not in Detroit.

Q. You then, of course, know nothing personally as to what may have taken place between the officers of that bank and Holtz & Company's agent, Mr. Le Maistre?

33 A. No sir, except as confirmed by subsequent events.

Q. Where is Mr. Le Maistre now?

A. Right here sir, in this room. (Indicating Mr. Le Maistre sitting beside him.)

Q. You say the certificate mentioned was endorsed in blank when you received it?

A. Yes sir.

Q. And you delivered it to the plaintiff in that condition?

A. Yes sir.

Q. Who delivered it to the plaintiff, do you know?

A. It was delivered in the usual course of business, sir, through our bank sending it down to a bank in Detroit for collection. My recollection is that it was the Central Trust Company of Illinois, through whom we delivered it, but I cannot answer for certain on that.

Q. You stated that certain legal opinions to which you made reference in your direct examination, were submitted to the Home Savings Bank before the purchases were made. Do you speak of that of your own knowledge, or is that hearsay?

A. Well sir, I, myself, delivered the papers to our agent for delivery to the Home Savings Bank, and the fact——

Q. You base your statement then on the assumption that he dealt with those papers as you instructed him?

A. Yes, and subsequently confirmed by information which I received from the Home Savings Bank.

Q. You know nothing personally apart from the fact that you gave them to Mr. Le Maistre?

A. To my absolute knowledge, that is all, sir.

Q. In order that I may understand the situation precisely; your company, Holtz & Company, received a commission for selling these certificates, I assume?

A. We were to get what profit we could get above a certain stipulated price, which certificates were to net the Federal Ballot Machine Company.

Q. How much were they to net the Federal Ballot Machine Company?

A. This particular certificate was to net the Federal Ballot Machine Company 97 and interest.

Q. You mean 97 cents on the dollar?

A. I mean 97 cents of the dollar.

Q. And accrued interest?

A. And accrued interest.

Q. Your profit consisted in the difference between 97 cents on the dollar and 99 cents or a little over, at which they were sold, is that it?

A. And the purchase price paid by the Home Savings Bank, yes sir, 99 cents or a little over.

34 Q. You were not present when the deal was closed with the Home Savings Bank?

A. No, sir.

The deposition of FONTAINE LE MAISTRE, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff, the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. State your full name, please?

A. Foutaine Le Maistre.

Q. Where do you reside?

A. Chicago, Illinois.

Q. Are you the Mr. Le Maistre who was spoken of as the selling agent of George T. Holtz & Company?

A. Yes, sir.

Q. And you were such in the year 1908?

A. Yes sir.

Q. I draw your attention to Plaintiff's Exhibit A, being a certain certificate of indebtedness numbered 1, of the City and County of Denver, State of Colorado, for $11,250, and ask you if you negotiated the sale of that security? (Handing same to witness).

A. Yes, sir.

Q. At the time you negotiated the sale how many coupons did it have attached?

A. I did not see the certificate, and therefore I could not say.

Q. In your negotiation, to whom did you present the certificate for sale? With whom did you have negotiations?

A. I had just the statement of the certificate. I did not have the certificate itself, but it was merely the statement of the certificate which I offered to several people among whom was Karl R. Davies & Company of Detroit, Michigan. Karl R. Davies & Company made the actual sale to the Home Savings Bank.

Q. What kind of a house are they? In what line of business are they?

A. They are in the business of investment securities.

Mr. BROCK:

Q. This was through whom?

A. Karl R. Davies.

Q. The negotiations then were through Karl R. Davies?

A. Yes. That is, the direct negotiations with the Home Savings Bank.

Mr. ZANE:

Q. What was the price at which that certificate was sold?

A. It was sold on a 6 per cent basis. I don't know the exact figures. It was on a 6 per cent basis; that is, it was to net the Home Savings Bank 6 per cent.

35 Q. That is, the Home Savings Bank was to pay such a price for that that it would net them the principal and six per cent interest?

A. That is it.

Q. When did you first become aware of the fact that the sale had been made to the Home Savings Bank?

A. About three weeks before the actual payment by the Home Savings Bank.

Q. Did you see any of the officers of the Home Savings Bank in connection with the matter?

A. No.

Q. You did not deliver the certificate yourself?

A. No sir.

Q. Did you deliver any paper to the Home Savings Bank such as the opinions of counsel and a certified copy of certain resolutions, and a paper from the President and Secretary of the Federal Ballot Machine Company, showing the authority of Mr. Andrew, the Vice-president, to endorse the paper?

A. No. I had no negotiations whatever with the Home Savings Bank. But——

Q. Did you deliver those papers to anybody?

A. Not personally, no. I asked the office to ship them to Karl R. Davies & Company, who delivered them to the attorney for the Home Savings Bank for his opinion——

Mr. BROCK:

Q. Are you stating that as a fact, or merely as your instructions? I do not understand which.

A. Those were merely my written instructions to the House. I was in Michigan at the time and I requested them to ship the papers to Karl R. Davies & Company.

Mr. ZANE:

Q. As to the payment made by the Home Savings Bank to H. T. Holtz & Company you have no personal knowledge, have you?

A. None whatever, except hearsay.

Q. And all you did was with the brokerage firm of Karl R. Davies & Company to negotiate a sale of this certificate to the Home Savings Bank?
A. Yes sir.
Q. What time was that?
A. Well, I cannot be definite, but it was in the spring of 1908.

Cross-examination.

By Mr. BROCK:

Q. Then you had no negotiations at all with any of the officers of the plaintiff, the Home Savings Bank?
A. None whatever.
Q. Then you have no personal knowledge as to what transpired in closing the deal with that bank?
A. None whatever.
Q. You do not know personally when the sale was effected?
36 A. Not the exact date.
Q. You heard of it within——
A. I heard of it, not through our House, but while I was in Michigan I heard that the delivery had been made.
Q. Did you hear of this before or after the delivery?
A. After the delivery.
Q. After the delivery, about three weeks afterward?
A. If I remember correctly, it was about three weeks after the offer was presented to the Home Savings Bank before they actually paid for it. That is just my remembrance.
Q. The whole matter was closed by Messrs. Davies & Company?
A. Yes sir.
Q. Acting as——
A. Acting as our agent.
Q. As your agent?
A. Yes sir.
Q. What particular individual carried on that transaction, or do you know?
A. Karl R. Davies himself.
Q. Where is he now?
A. I believe he is in Detroit.

The deposition of OLE CHRISTIAN OLSEN, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff; the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. Please state your name?
A. Ole Christian Olsen.
Q. Where do you reside, Mr. Olsen?
A. Minneapolis.

Q. Have you ever had any business in connection with the Federal Ballot Machine Company?

A. Yes. I was the office manager of the company at Minneapolis.

Q. When?

A. In 1905, 1906 and part of 1907.

Q. Do you know Mr. Adam Andrew, the Vice-president of the Federal Ballot Machine Company?

A. Yes.

Mr. BROCK: Let me get his statement as to when he was office manager.

The WITNESS: I was office manager during 1905, 1906 and a part of 1907. And I was Assistant Manager, in charge of the factory end, until the factory was moved out to Jamestown last February.

Mr. ZANE:

Q. Are you now in the employ of the Federal Ballot Machine Company?

A. No sir.

Q. Are you also acquainted with Mr. George W. Reed, the Secretary of the Federal Ballot Machine Company?

37 A. Yes, I am.

Q. Do you know the signature of Mr. Adam Andrew?

A. Yes sir.

Q. You became acquainted with his signature how?

A. By seeing him personally sign his name, and also by seeing it on numerous letters, stock certificates and other instruments.

Q. I draw your attention now to Plaintiff's Exhibit A and ask you if you recognize under the words "Federal Ballot Machine Co." the signature that is put upon the paper there (Handing the document in question to the witness)?

Mr. BROCK:

Q. Did your statement as to knowing the signature go to both of these gentlemen or only to Mr. Andrew?

Mr. ZANE: I asked him about Mr. Andrew first.

The WITNESS:

A. This is Mr. Andrew's signature.

Q. You know that that is his signature?

A. I know that that is his signature.

Q. I draw your attention to the endorsement on the coupon, which is Plaintiff's Exhibit D, and ask you if that is also his signature? (Handing same to the witness).

A. Yes sir, that is Mr. Andrew's signature.

Q. How did you become acquainted with the signature of George W. Reed, the Secretary of the Federal Ballot Machine Company?

A. I saw it on stock certificates, and numerous letters and other documents.

Q. You have also seen him write?

A. Yes. Well no, I have not seen him sign his name.

Q. But in the office there where you were engaged, his signature often passed under your notice?
A. Yes, quite often.
Q. On documents?
A. Yes, on documents, and to letters, etc.
Q. I draw your attention now to the signature of George W. Reed on Plaintiff's Exhibit E, and ask you if that is his signature? (Handing same to witness).

Mr. BROCK:

Q. You say you never saw Mr. Reed write his name?
A. Well, I cannot say that I have seen him write his name except I have seen him write.
Q. You have seen him write but you have never seen him write his name, so far as you recollect?
A. I believe—he must have signed it when I saw it, although I cannot say just when, but I know his signature thoroughly.

38 Mr. ZANE:

Q. Is that his signature on Plaintiff's Exhibit E.
A. That is his signature.

No Cross-examination.

The deposition of JULIUS H. HAASS taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 15th day of February, A. D. 1910, on behalf of the plaintiff; the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. Please state your name?
A. Julius H. Haass.
Q. Where do you reside?
A. In the City of Detroit, Michigan.
Q. How long have you resided there?
A. Almost 41 years. That has been my residence all my life.
Q. Have you any official connection with the Home Savings Bank at Detroit?
A. I am president of the Home Savings Bank at that city.
Q. How long have you been president of that bank?
A. Since last February, I have been president.
Q. You have been president since February, 1909?
A. Yes sir.
Q. Prior to that time what was your position?
A. I was cashier prior to that time.
Q. The cashier of the Home Savings Bank?
A. Of the Home Savings Bank.
Q. At any time while you were cashier was a certificate of indebtedness of the City and County of Denver, which has been marked Plaintiff's Exhibit A, brought to your attention as a security?

A. Yes sir. This is the certificate (Indicating same). Shall I answer fully in this statement?

Q. Yes.

A. (Continuing) —and was bought by the Home Savings Bank through me on June 19, 1908, with this check (referring to the check), from the First National Bank of Detroit, to whom it was sent by H. T. Holtz & Company of this city, with this letter (Indicating same).

Mr. BROCK:

Q. June 19, 1908?

A. June 19, 1908. That check is so dated. It was placed on our books June 20, 1908. Here is a copy of our discount register.

39 Mr. ZANE:

Q. With whom did you have your negotiations for the purchase of this certificate?

A. I had negotiations with two Detroit brokers. One was Karl R. Davies and the other one was Ehrman, his first name I have forgotten for the moment.

Q. They purporting to represent Holtz & Company?

A. To represent Holtz & Company, yes sir. They were agents for Holtz & Company in this transaction.

Mr. BROCK:

Q. What was the name of that second man?

A. Now I recall. Adolph Ehrmann. Adolph is his first name; he brought this to my attention, and he represented Karl R. Davies.

Q. At the time you purchased the certificate did it have any coupons on it?

A. Yes, sir.

Q. How many?

A. I don't recall that, but I think it had two or possibly more.

Q. It did have, as a matter of fact, two?

A. I believe two. I am not clear on that though, Mr. Zane. There were coupons attached, yes sir. There were coupons attached.

Q. It drew interest semi-annually?

A. Semi-annually. It was——

Q. It recites that it was two coupons attached?

A. Yes.

Q. So it should have had two coupons?

A. Yes sir.

Q. You notice that the certificate itself recites that it has two coupons attached?

The WITNESS (After examining the certificate): Yes.

Q. One of these coupons is the coupon which has been marked Plaintiff's Exhibit D?

A. Yes sir.

Q. Now, at the time that you received the certificate, it was endorsed in blank by the Federal Ballot Machine Company?

A. Yes sir.

Q. By the way, this endorsement that is written above the blank

endorsement by the Federal Ballot Machine Company, that is "Pay to the order of the Home Savings Bank," who wrote that?

A. That is written by myself, sir.

Q. Your handwriting?

A. My handwriting. And this other endorsement we had verified. We had it verified.

Q. How did you have it verified?

A. I say that by correspondence we had it verified, to see that it was authorized and endorsed. Here is some of the correspondence (producing and handing to Mr. Zane several letters), showing that this man was authorized to endorse for the company.

40 Q. You had submitted to you a certified copy of a resolution of the Board of Directors authorizing Mr. Adam Andrew to sell and so on?

A. You see that is signed by Mr. Henkle, of the Illinois Trust & Savings Bank.

Q. The other one is it. Do you remember, after having seen this one, of which you retained a copy?

A. Yes. We sent the original papers to our attorneys to examine them, and they made a report on them and kept this copy. Whether that is an original I am not sure, but it was a paper similar to that,——

Q. It was either Plaintiff's Exhibit E or another original?

A. Or another original.

Q. And you retained a copy?

A. We retained a copy, yes.

Q. You also had submitted to you a copy which has been marked Plaintiff's Exhibit F, of which you retained a copy?

A. Yes sir, a paper similar to this, or that one (indicating).

Q. Do you remember that you also had submitted to you any opinions of attorneys?

A. Yes sir, we had the opinion of this legal firm and others. I have a copy of them here. Would you like to see it?

Mr. ZANE: We have introduced the original in evidence.

The WITNESS: All right, sir. There is a copy of your opinion (Handing same to Mr. Zane).

Q. Who were the others?

A. Of our own attorney, and then there was,—I don't know very much about this one. We depended somewhat upon Mr. Zane's opinion, somewhat more upon his opinion because some of our directors are acquainted with him and one of our directors especially knows Mr. Zane very favorably, and we relied on that information.

Q. In paying for the certificate you paid through the First National Bank of Detroit, Michigan?

A. Yes sir. Let me see; the certificate laid there, I should say, a week or more because we wished to verify the endorsement and while our attorney looked over the papers. You will see the memoranda which the First National made, attached to their letter, saying that they wanted to verify the signature or the endorsement or something like that, because it was unknown to us, and the First National held it in the meantime.

Q. Now, the check which you issued for that certificate is the check which you have produced?

A. Yes, sir.

Mr. ZANE: I will ask the reporter to *make* the check which has been produced by the witness as Plaintiff's Exhibit H, with
41 his initials. The check referred to was marked as requested.

Mr. ZANE:

Q. To whom did you deliver this cashier's check?

A. To the First National Bank. You will see their endorsement on the back, through the Clearing House. The First National Bank of Detroit.

Q. You have also the letters transferring that certificate of indebtedness to the First National Bank of Detroit, which you have produced?

A. Which they loaned to me yesterday for this purpose. That belongs to the First National Bank of Detroit. I asked for this letter, which they loaned to me for the purpose of showing this transaction and what connection they had with it.

Mr. ZANE: I will ask the reporter to mark this letter which has been produced as Plaintiff's Exhibit I.

The letter referred to was marked as requested.

Q. That is the signature of H. T. Holtz & Company?

A. Let me look it over carefully. (The witness examined the signature carefully). Here is one (producing it). Yes, I should say that is. It is exactly the same signature.

Q. The certificate when it was sent over was accompanied by a bill, was it?

A. Yes sir.

Q. And that bill you have produced?

A. That bill we had in our files; it was put in the files in the usual way, when we buy any bonds we put the bill in the files until it is paid, and then it is put in these files that way.

Mr. ZANE (addressing the reporter): Please mark this receipted bill Plaintiff's Exhibit J.

The bill was marked as requested.

Mr. ZANE:

Q. So this certificate with the coupons was bought by the Home Savings Bank, just as any other municipal security, in the due course of business?

A. After a careful investigation, in due course of business, the certificate was bought in good faith by the Home Savings Bank as an investment.

Q. And as an outright purchase?

A. As an outright purchase.

Mr. BROCK: I object to the preceding question of counsel and to the answer, and I move that the answer be stricken out on the ground that it is the statement of a conclusion.

42 Mr. ZANE:

Q. The first coupon on Plaintiff's Exhibit A was paid, was it not?

A. I was just thinking about that. To the best of my knowledge it was. I didn't look up that point, but I believe it was paid. In fact I know we have not got it, so I know it must have been paid. Yes, I know it was paid. It was paid, although I did not look at that point particularly, but I know it was paid:

Cross-examination.

By Mr. BROCK:

Q. Mr. Haass, you were the only person who had any negotiations about the purchase of this certificate on the part of the Home Savings Bank?

A. I was.

Q. You did all the business?

A. I did all the business, and I conferred with our loaning committee, but I did all the business of purchasing this certificate, yes sir.

Mr. KANE:

Q. Did you have any knowledge or was there any intimation made to you by anyone that the certificate had not been issued in good faith, that they were not valid securities of the City and County of Denver?

A. No sir, on the contrary I had the information of our attorney that they were absolutely valid, and that the City of Denver was obligated to pay this certificate. Our attorney is a man who investigates a lot of Michigan farms. In fact he is probably the best authority there is in Detroit. The national banks use him whenever they buy bonds. And he told me, and he tells me to-day that——

Mr. BROCK: I object to any statement made by counsel.

The WITNESS: All right, sir.

Mr. ZANE:

Q. Did you receive any notice or any intimation or did you have any knowledge of any kind whatever that there was any claim made that these certificates had been improperly secured from the City and County of Denver?

A. Under no circumstances. Had we had, we would not have touched them for a minute. We thought they were absolutely good.

Mr. BROCK:

Q. Do you know anything about what is called the Federal Ballot Machine?

A. No sir, and I don't care anything about it.

Q. That is a voting machine for which these certificates had been issued?

43 A. I did not at the time know anything about it, but I have since because that same subject has come up in Detroit

within the last few weeks. But I did not at that time know anything about the Ballot Machine, nor did I care. I knew about Denver because I had been there. I knew that Denver was a good city.

Q. You knew these certificates had been issued for the payment of these voting machines, did you not?

A. Yes, that they were in payment for these voting machines, but I knew it was the debt of the City of Denver, Colorado, and that was all we cared about.

Q. You say the entire negotiation, so far as the Home Savings Bank was concerned, in acquiring this certificate, was carried on through you?

A. Yes.

Q. And by no one else?

A. The entire negotiation was carried on through me and no one else.

Q. The first person who talked to you about it was Mr. Ehrmann?

A. Yes, I should say he was.

Q. And you say he was a representative of Mr. Davies?

A. He was in some way connected with Mr. Davies. Mr. Ehrmann——

Q. The deal was not closed with Mr. Ehrmann, but with Mr. Davies?

A. After some correspondence with the owners of the certificates—Holtz & Company—I think the deal closed through Holtz & Company because they simply presented the matter, and we dealt through Holtz & Company and through the First National Bank of Detroit. We did not pay Davies or Ehrmann.

Q. Did you agree on the price to be paid? [*A.*] Was it with Mr. Davies?

A. Yes; Mr. Davies and Mr. Ehrmann.

Q. Were they both present?

A. Mr. Davies—I don't know. I know that the final arrangement was made with Mr. Davies.

Q. What did you agree to pay for the certificate?

A. The price stated in that bill there (indicating same).

Q. You mean in Exhibit J?

A. Yes.

Q. $11,355.63?

A. Yes sir, and that included interest and all. I might amend by saying—I don't know whether I shall say anything without being directly questioned?

Mr. ZANE: Go right along.

The WITNESS (continuing): You know, at that time the banks were not buying very many bonds. It was immediately after
44 the panic, and the banks were not loaning out much money or buying bonds to any great extent. The rates were higher, and we could get better rates, and we were buying securities at as good advantage as we could get at that time; while to-day that would be a somewhat higher rate to me, yet back in the panic time or shortly after it it was not. We were buying some bonds right through the last panic, and therefore it was a little higher rate than

we could get to-day, but not high for them when you consider what the United States Steel Corporation bought the bonds of the Tennessee Coal and Iron Company for.

Q. Mr. Haass, did you have any agreement of any sort by which under any circumstances this certificate should be taken back either by Holtz & Company or the Federal Ballot Machine company?

A. No sir, under no circumstances. I had no agreement whatever that Holtz or the Federal Ballot Machine Company should take them back, only as the Federal Ballot Machine Company is an endorser on the note and the note was protested.

Q. You did not require any endorsement by Holtz & Company?

A. No sir, they are not obligated. The only thing which I should think would require Holtz & Company to pay would be a forgery or fraud in selling them to us.

Q. Holtz & Company were not called upon by you to endorse the certificate?

A. No sir, we have never bought a bond or a certificate of a bond or brokerage house that——

Q. I don't care to put in here anything about any other case. You are getting a good deal more into the record than I care for.

The WITNESS: All right, sir. Excuse me.

Q. You purchased this certificate, endorsed by the Federal Ballot Machine Company in blank?

A. Yes sir.

Q. And without any other endorsement?

A. Without any other recourse.

Q. Did you have any other security of any sort?

A. No other security or agreement than as stated in that bond.

Q. Did you have any understanding either with the Federal Ballot Machine Company or with Holtz & Company, as to who would bear the expense in the event that it would be necessary to prosecute an action at law or otherwise to recover on those certificates?

A. No sir. And that was not thought of by me or by our bank.

45 Q. You have no agreement of that sort now? None has been added to it?

A. What is that? That is, that they are to pay the expense of this?

Q. That anyone is?

A. The agreement is that if there are any unusual expenses we are to bear our share.

Q. What is your share, Mr. Haass?

A. I don't know.

Q. With whom have you made that sort of an agreement? With the Federal Ballot Machine Company?

A. No sir. We have never had any talk, nor have I had any talk with the Federal Ballot Machine Company, and I don't know them.

Q. With the Federal Ballot Machine Company?

A. When this was protested Holtz & Company said "We will try to get your money as brokers, but if there is any unusual expense

to the thing, you will have to stand your share of it," to which we agreed.

Q. That was the agreement with Holtz & Company?

A. That is what they wrote us. There is no real agreement about it.

Mr. ZANE:

Q. That was after it was protested?

A. That was after it was protested. After the note was refused payment on in Denver.

Mr. BROCK:

Q. After it had been protested do you remember what particular individual wrote this letter for Holtz & Company?

A. I think Mr. Coffin. I think I am calling that word rightly.

Q. Do you know what was meant by that agreement in which it was stated that you should bear your part of the expense?

A. Well, I believed they thought that Denver, on account of the political situation, would just make a grand-stand play and then drop down and show that they had not a leg to stand on, and that there would be nothing to it. That is what they thought, and that is what we thought. But the thing has been protracted and has run along, but to our surprise.

Q. I am trying to get at the meaning of your agreement to bear your own part of the expense.

A. Well, that is my meaning, that these new people in political power thought that they would make a sort of grand-stand play, and hold that up to show what great people they were. We thought that then, by putting on a little pressure they would pay. But they have not done so as yet.

46 Q. Still I get no information at all from that statement about the grand-stand play, as to what expenses you mean. I know no more about it now than I did before you answered the question.

The WITNESS:

A. I will tell you plainly. We do not know to-day how much expense we will have to pay, and we do not know how long this thing will be protracted. I do not think that you or Mr. Zane knows how much expense it will be if it is fought out for another year.

Q. Without giving dollars and cents, can you tell me what expense you had in mind to bear your part of? What character of expense did you have in mind?

A. Well, what character of expense did we have in mind?

Q. Yes.

Q. We have in mind to-day that we are not obligated thus far for any expense.

Q. But you told me that you——

A. Well, I don't know; unless there was some unusual legal expense.

Q. What did you mean by "unusual expense?"

A. Now, of course, you are getting into the law part of it. That is a part that I am not so familiar with. As I said, we did not think there would be much to the thing at all. We thought it would be paid after a good firm demand had been made.

Q. But you agreed with Holtz & Company that you would bear your part of the expense?

A. We did not make any agreement. That was a letter that they wrote us.

Q. Do you think they just happened to write such a letter? What did they do it for?

A. I will tell you why. It is very often the custom of a bond house, when they sell a security to see it through. They want to keep their reputation intact.

Q. That is what I wanted to understand. Did Holtz' Company agree with you when you purchased——

A. No sir.

Q. (Continuing:) That they would see it through?

A. I told you they did not. Neither does any bond house; but a bond house must keep its skirts clear. They don't want to sell securities and have them fall down. Some bond houses advertise the fact that they never have sold a security that has fallen down.

Q. You had no agreement with Holtz & Company in the first instance at all, did you?

A. None whatever that they were to——

47 Q. Nevertheless, when the certificate was protested they did say to you——

A. They said that they regretted it very much and were surprised——

Q. (Continuing:) —but that you would have to bear your part of the expense. Did you understand from that that they were going to bear any part of the expense themselves?

A. Yes, I understood that, that they were going to bear the first part of the expense.

Q. That they were going to bear the first part of the expense?

The WITNESS: You ask Mr. Coffin about that?

Q. Do you know?

A. No, I don't know absolutely. I think, if they had put in a reasonable bill the claim would have been allowed. We want to do the right thing. It has been an unexpected thing for us and for them, and we are meeting it as fairly as we know how.

Q. After the matter was taken up with you and before the purchase, did you have any negotiations with the Federal Ballot Machine Company itself at all?

A. I never had any negotiations either with the bank or the Ballot Machine Company, either verbal or written.

Q. Did you have any correspondence or negotiations with the Ballot Machine Company either before or after the certificate was protested?

A. Never before or since.

Q. Your entire dealing has been with Holtz & Company?

A. Yes sir.

Q. Either through the office here in Chicago——

A. Yes sir.

Q. (Continuing:) —or through Mr. Davies, their representative in Detroit?

A. Yes sir.

Q. You had nothing to say by correspondence or otherwise, to the Federal Ballot Machine Company as to their liability to you as an endorser of this certificate?

A. Nothing to say to them?

Q. Yes.

A. I never wrote them. They were notified by the Denver National Bank, which received the protest notice, or at least the notary certified so in the certificate. But we never had any dealings with them. I do not even know where their headquarters are.

Q. You recognize that they are liable primarily to you as endorsers of this paper, don't you?

A. I don't think primarily. I think Denver is recognized as primarily liable; and they are second.

48 Q. Then you never regarded the Federal Ballot Machine Company as primarily liable to you at all?

A. The Federal Ballot Machine Company?

Q. Yes.

A. No. I think the City of Denver is primarily liable to us. They are the endorser. Who they are and how strong they are, I don't know anything about that.

Q. Mr. Davies is in Detroit, I believe?

A. Yes, he was yesterday. He came in to see me and get a copy of that exhibit there (indicating), that receipt which Holtz & Company gave me.

Redirect examination.

By Mr. ZANE:

Mr. ZANE: In connection with the deposition of Mr. Haass, we offer in evidence Plaintiff's Exhibit H, Plaintiff's Exhibit I and Plaintiff's Exhibit J, which are original files; and we will substitute in the deposition in their stead, copies, and will ask leave to make their substitution and will agree to procure the originals if there is any question about the originals, which have been marked by the reporter.

CHARLES HOWELL COFFIN, being recalled on behalf of the plaintiff further testified as follows:

Direct examination.

By Mr. ZANE:

Q. Mr. Coffin, at the time this particular certificate and at the time the coupons on all of the certificates for the second semi-annual installment of interest were protested at Denver, what did H. T. Holtz & Company do in regard to the latter, and what was the reason for it? I wish you would explain that?

A. As soon as we were advised of the default we notified all of our clients, that is customers who had purchased these certificates of us, that we would do the best we could to get the matter straightened out. At the same time, I wrote the Federal Ballot Machine Company, notifying them of the default, and made what might be called a formal demand on them for payment. I was not fully advised as to whether it was legally necessary, but I did it simply as a precautionary measure.

We then immediately took up the matter with Mr. Harry Weber of the firm of Shope, Zane, Busby & Weber of Chicago, and we retained him ourselves in the matter to go forward with it and disclose the circumstances, and to find out what was necessary to be done. We told our customers that we would not ask them to bear any part of the preliminary expenses in the matter. At that
49 time all we had in mind was the expense that would be incurred in disclosing the real state of affairs that existed. As a matter of fact, we have never asked any of our clients to bear any of the expense in this matter, and unless the expense grows very heavy we have no immediate intention of doing so.

Q. And [*who*] do you do that? Is it because you feel any responsibility?

A. We did not and we do not feel under any legal responsibility to do that at all, but on the other hand we try to keep up the reputation of our house on the highest level possible. We do not want to sell a security to a customer that will give him trouble. If it gives him trouble we want to use our best endeavor to any reasonable extent to protect him and to make the collection, whenever necessary. It is the policy of our House to do so, as I believe it is the policy of every respectable bond house.

Q. In other words, that is due to the fact that you desire to keep your reputation as a brokerage house, dealing in securities of this kind, beyond question in regard to the securities you deal in?

A. Yes sir, if we can, we would like to make it a little better than that. Our reputation is our best asset.

Cross-examination.

By Mr. Brock:

Q. Was it you who wrote the plaintiff that they would be expected to bear their part of the expense?

A. No sir. I did not put it that way, that they would be expected to bear their part of the expense. My recollection is that we did not assume to bear the entire expense. In other words, while we have no immediate intention of calling on them to pay any part of the expenses, still we do not want to obligate ourselves to pay every expense that might be incurred, because it might conceivably embarrass us to do so.

Q. Did anyone, any officer or agent of your company have anything to do with the transaction with the Home Savings Bank excepting the particular persons who have been mentioned in this deposition?

A. No sir. I would qualify that however, to this extent, I am under the impression that Mr. Holtz, subsequent to the transaction, that is the purchase of the certificate, and since the default was written some letters in my absence, but that is all.

Q. I have reference to the two transactions prior to the commencement.

A. No sir.

50 Mr. ZANE: In connection with the deposition of Mr. Coffin, we offer in evidence Plaintiff's Exhibit A, together with the notarial protest.

We also offer Plaintiff's Exhibit B.

Which was objected to as immaterial by counsel for defendant.

The counsel for plaintiff offered in evidence Plaintiff's Exhibit C.

Which was objected to by counsel for defendant.

Plaintiff's counsel offered in evidence Plaintiff's Exhibit D and Plaintiff's Exhibit E.

Counsel for Plaintiff offered in evidence in connection with the foregoing deposition, Plaintiff's Exhibit F.

Mr. BROCK: I have already objected to that.

Counsel for plaintiff thereupon offered in evidence in connection with the foregoing deposition, Plaintiff's Exhibit G.

Mr. ZANE: And we will substitute copies in the deposition and hold the original exhibits, subject to their production in court if called for upon the trial of the cause.

Mr. BROCK: If required at the trial.

Mr. ZANE: Yes, if you want them.

The deposition of Karl R. Davies, taken before E. Bentley Hamilton, a Notary Public within and for the County of Cook in the State of Illinois, in the City of Chicago, Illinois, on the 17th day of February, A. D. 1910, on behalf of the plaintiff; the witness being first duly sworn testified as follows:

Direct examination.

By Mr. ZANE:

Q. State your name, please?
A. Karl R. Davies.
Q. Where do you reside, Mr. Davies.
A. Detroit, Michigan.
Q. Are you in business there?
A. I am.
Q. In a partnership or in a corporation, or how?
A. I operate under the name of Karl R. Davies & Company.
Q. But you are the "& Company"?
A. I am the whole thing.
Q. Now, what is your business?
A. My business is the sale of investment securities.
Q. Were you so engaged in this business in the year 1908?
A. I was, sir.

51 Q. I draw your attention to a certificate of indebtedness of the City and County of Denver, State of Colorado, num-

bered 1, for $11,250.00, and ask you if you ever saw that certificate or ever had any connection with its sale (handing same to witness), said paper being marked Plaintiff's Exhibit A?

A. To the best of my knowledge and belief I believe I have seen that certificate before, at the First National Bank of Detroit.

Q. Did you negotiate any sale of that certificate?

A. I did, to the Home Savings Bank?

Q. Of Detroit?

A. Of Detroit.

Q. When was that?

A. I cannot give you the exact date, that ought to be on Holtz's bill.

Q. It is shown by the paper, but I thought possibly you would remember it.

A. No, I don't remember it. We had so many of those transactions. The certificate was billed from Holtz to the Home Savings bank.

Q. Who brought the certificate to your attention first?

A. How do you mean? In what way?

Q. For sale.

A. Mr. Le Maistre.

Q. He was representing H. T. Holtz & Company?

A. He was their representative, their traveling representative.

Q. And you had the negotiations with the Home Savings Bank?

A. My man, Mr. A. W. Ehrmann concluded the sale to the Home Savings Bank.

Q. And what was the sale for? Do you remember the figures?

A. No sir, I cannot give those.

Q. You would only recollect that by seeing the bill?

A. That I would only recollect by seeing the bill.

Q. Did you ever see the bill?

A. I saw the whole thing over at the First National Bank. The whole thing was called to my attention over there.

Q. I show you Plaintiff's Exhibit I and Plaintiff's Exhibit J, the one being a letter transmitting the certificate to the First National Bank of Detroit and the other the bill for the same, made by H. T. Holtz & Comapny, to the Home Savings Bank of Detroit, and ask if these are the papers that were at the First National Bank that you saw (handing same to witness)?

A. (After having examined the papers). Those papers are the same that I saw, to the best of my knowledge and belief.

Q. The sale was a regular sale in due course of business, like any other sale of municipal securities made by you?

A. Yes sir.

52 MR. ZANE: I think that is all.

Cross-examination.

By MR. BROCK:

Q. Who do you say first brought the certificate to your attention, Mr. Davies?

A. Mr. Le Maistre, of Holtz & Company.

Q. Was it as his suggestion that the matter was taken up with the Home Savings Bank?

A. No, it was not at his suggestion at all.

Q. Tell us what occurred between you and Mr. Le Maistre?

A. Nothing occurred only in this way, that he probably came into the office with that and offered it at a price that looked attractive, and I said "possibly I can handle that for you among some of my clients in the city of Detroit."

Q. Did you have any information at that time, or did he give you any information as to what the certificate was issued for?

A. He had a circular—that is the information—drawn up in such form as bonds and certificates usually are.

Q. You mean a circular prepared by his house?

A. A circular prepared by his house.

Q. You knew then that this certificate had been issued on account of the purchase of voting machines?

A. I don't recollect whether I knew it was issued for voting machines or what it was for. I knew that it was a certificate of indebtedness of the City of Denver at that time.

Q. Did you know anything about the Federal Ballot Machine Company?

A. No, I had no knowledge of them.

Q. Who first from your office took the matter up with the Home Savings Bank?

A. Mr. Ehrmann.

Q. By whom was the transaction closed? By you or by him?

A. By Mr. Ehrmann.

Q. By Mr. Ehrmann?

A. Yes sir.

Q. And not by you?

A. Not by me personally.

Q. Are you sure of that, Mr. Davies?

A. Well, as far as I can remember. I might have arranged the details of the delivery of the certificates, don't you know, and all that sort of thing; but Ehrmann made the sale.

Q. Do you mean that the final transaction as between the Home Savings Bank——

A. The confirmation——

Q. (Continuing:) —and you was concluded by Mr. Ehrmann or by you?

A. The confirmation was by myself, over the telephone, I presume, to the Home Savings Bank. Mr. Ehrmann conducted the negotiation, the same as any other man in the office would.

53 Q. The Home Savings Bank agreed to purchase this certificate before you had any conversation with them at all?

A. They had practically agreed to purchase it.

Q. Who was it you talked to of the Home Savings Bank people about this certificate?

A. Mr. Haass.

Q. What was said between you and him?

A. I don't recall only he said there were certain documents that

were necessary for his legal department to have, and which I called on Holtz & Company, I think, to furnish.

Q. Do you know exactly what the agreement was as made either by [your]or by Mr. Ehrmann acting for you with Mr. Haass?

A. In what way do you mean? What form of agreement do you mean?

Q. I have reference to the terms of the sale.

A. The terms of the sale were cash on delivery.

Q. What is that?

A. The terms of the sale were cash on delivery. When the certificate is delivered to the——

Q. There was no written evidence of your agreement entered into at all?

A. No. We do not usually have that in the bond business.

Q. Was there any conversation between you and Mr. Haass as to the probability or improbability of this certificate being paid at maturity?

A. Not that I know of. I think they looked upon the City and County of Denver as being all right, from their past record.

Q. Anything said between you and him as to the transaction between the Ballot Machine Company and the City and County of Denver upon which this certificate had been issued?

A. I don't remember that the Federal Ballot Machine Company entered into the matter at all. They simply looked to the City and County of Denver to take care of this obligation.

Q. Did you make any sort of an agreement or have any sort of an understanding with Mr. Haass as to what should take place in the event that the City and County of Denver did not pay this certificate?

A. I don't remember of ever making any agreement with Mr. Haass of any kind. I think he was perfectly satisfied with the standing of the City and County of Denver.

Q. In the sale of this certificate, Mr. Davies, do you say that there were no conditions or strings attached to it at all?

A. I cannot remember any.

Q. Was there anything said as to whether, in the event of a suit over it, that part of the expense would be borne by you or by Holtz & Company?

54 A. No sir, we never make any agreements of that kind.

Q. I am simply trying to find out whether you did in that case. You say you did not?

A. No, we did not.

Q. Nothing of that sort was discussed?

A. No. It was a straight sale, and those things are not discussed in a straight sale.

Q. You understand, that that is just what I am trying to find out. This was then a straight out and out sale?

A. It was a straight and legitimate sale.

Q. With no conditions whatever attached to it?

A. No conditions whatever. He was to pay his money the same as if I were to sell you 50 shares of stock of the Chicago Edison

Company, I would deliver to you a certificate, and you would pay me the money.

Q. And there were no conditions whatever attached to it?

A. No.

Q. You are not able to say whether Mr. Ehrmann and Mr. Haass entered into any conditional agreement about it?

A. I know that if there had been any conditional agreement I would have known of it.

Q. The deal was ultimately confirmed and closed by you?

A. Well, yes.

Q. You don't remember just when that was?

A. No I don't, I cannot recall.

Q. What commission did Holtz & Company get out of this?

A. I don't know.

Q. What commission did you get?

A. I think we got about $90.00. I think I paid Mr. Ehrmann $40. or $45. I have forgotten which.

Q. Is Mr. Ehrmann an employe of yours or does he work on commission?

A. He had formerly been with the old Detroit National Bank, and was not doing anything at that time, and he came to me on a commission basis temporarily.

Q. Where is Mr. Ehrmann now?

A. He is in the accounting business in the City of Detroit.

Q. When did you first hear that this certificate had not been paid at maturity?

A. I cannot state that, only that I was in to see Mr. Black, of the Detroit & Cleveland Navigation Company, to whom, through Mr. Phil McMillan, I sold one of these certificates also; and Mr. Black mentioned the fact that they had not paid the interest; and I remember I took it up with Holtz at that time to see what was the matter. I received several letters from Holtz & Company after that, giving the details of the trouble.

Q. Did you have any conversation with Mr. Haass about it?

55 A. I don't remember whether I dropped in there to see him or not about it. I guess I did. But what it was about I don't remember. I simply dropped into the bank there and asked him what he had heard.

Q. Among the written documents which you used in connection with the sale, was a copy of a contract between the City and County of Denver and the Federal Ballot Machine Company placed in your hands?

A. I don't recall. There were certain papers which were received which we turned over to the Home Savings Bank and had their attorney examine. Just what those documents were I cannot recall; but I presume that all the details were there.

Q. Do you remember anything about the guaranties made as to the efficiency of these ballot machines in that agreement?

A. No, I do not. We have so many of these things. At the time they impress us, but when a deal is all closed they are liable to slip

one's memory. I should presume though, that the machines had been satisfactory or they would not have paid for them, because that is generally the method of handling business matters of that kind.

Q. Do you remember whether you discussed with Mr. Haass this written instrument containing the guaranties as to the efficiency of the machines?

A. No, I took it for granted that the machines were all right or they would not have paid for them.

As appears elsewhere herein, the signature of this witness to the foregiong deposition was waived by agreement of counsel.

PLAINTIFF'S EXHIBIT A.—G. G. T.

Certificate of Indebtedness.

$11,250.00. No. 1.

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of Eleven Thousand Two Hundred and Fifty Dollars, and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, State of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the State of Colorado, Act of 1905, hereby issues its Certificate of Indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of Eleven Thousand Two Hundred and Fifty Dollars,
56 with interest on *the* sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons hereto attached. Interest and Principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This Certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the State of Colorado, by its Chairman, and attested by the County Clerk and Recorder with the seal of the County, authorized thereto by resolution of the 20th day of February, 1909.

Denver, Colorado, February 20th, 1908.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,

[SEAL.] By S. C. D. HAYES, *Chairman.*

Attest:

ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

The following is written across the face of the foregoing certificate, with a red ink stamp and partly in handwriting in ink:

Protested Feby. 23, 1909, for non-payment Geo. O. Dostal, Notary Public.

The following appears on the back of the foregoing certificate: Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Machine Co. A. Andrew, Vice-Prest.

No. 1. $11,250.00.

City and County of Denver,
Colorado,
to
Federal Ballot Machine Co.
Certificate of Indebtedness.

Due February 20th, 19—

Semi-Annual Interest Coupons, $281.25 payable 20th of August, and February.

Copy.

Certificate of Indebtedness.

$11,250.00. No. 1.

City and County of Denver, State of Colorado.

57 The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver in the sum of Eleven Thousand Two Hundred and Fifty Dollars, and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, State of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the State of Colorado, Act of 1905, hereby issues its Certificate of Indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of Eleven Thousand Two hundred and Fifty Dollars, with interest on this sum, from the date hereof, at the rate of five per cent per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This Certificate is one of a series of ten issued in like sum, payable annually.

Signed by the Board of County Commissioners of the City and County of Denver, of the State of Colorado, by its Chairman, and attested by the County Clerk and Recorder with the seal of the County, authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20, 1908.

BOARD OF COUNTY COMMISSIONERS
OF THE CITY AND COUNTY OF
DENVER,

[SEAL.] By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the
City and County of Denver, Colorado.

STATE OF COLORADO,
City and County of Denver, ss:

Be It Known, That on the 23rd day of February, in the year of our Lord nineteen hundred and nine at the request of the Denver National Bank, I, George O. Dostal, a notary public, duly admitted and sworn, dwelling in Denver, City and County of Denver, and State aforesaid, presented the original note of which the above is a true copy at the office of The County Treas'r of the City and County of Denver and demanded payment thereof, which was refused; reason cannot pay whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the maker *and* endorser of the said note.

58 And I, the said notary, do hereby certify that on the same day and year above written, I deposited in the post office in said Denver, notice of the foregoing protest, partly written and partly printed, signed by me and folded in the form of letters, as follows, viz: Notice for Board of County Commissioners Directed Denver, Colo. Notice Treas'r of City and Co. of Denver directed Denver, Colo. Notice Federal Ballot Machine Co. directed San Francisco, Calif. Notice Home Savings Bank, directed Detroit, Mich., being their respective reputed place- of residence and nearest post office thereto; and further that on the day and year aforesaid, I served like notices of the foregoing protests, as follows, viz:
Notice for —.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office at Denver, aforesaid, this 23rd day of February, A. D. 1909.
In Testimonium Veri*a*tes. My commission expires January 3, 1912.

Fees:

Noting and Recording.....	$1.75
4 notices @ 50.....	2.00
	$3.75

[SEAL.] GEO. O. DOSTAL,
Notary Public.

PLAINTIFF'S EXHIBIT B.—G. G. T.

H. P. Bennet, Jr.,
Attorney at Law.
With First National Bank.

DENVER, COLO., Feb. 26, '08.

To Whom It May Concern:

I hereby certify that I have made careful examination of the laws and all proceedings pertaining to the purchase by the City and County of Denver, State of Colorado, of one hundred and fifty Dean Ballot Machines from the Federal Ballot Machine Co. and the is-

suance and delivery to said Company of Certificates of Indebtedness for the aggregate sum of $112,500 in payment therefor and in my opinion the said Certificates of Indebtedness being Nos. one to ten both inclusive with interest coupons thereto attached, were duly issued and delivered in full compliance with law, that all proceedings relating thereto were regularly had and that said certificates and all thereof are good and valid securities and binding
59 obligations to the legal holder or holders thereof, on the part of said City and County of Denver, payment whereof is enforcible, if necessary, in any competent tribunal.

H. P. BENNET, JR., *Attorney.*

PLAINTIFF'S EXHIBIT C.—G. G. T.

Shope, Zane, Busby & Weber,
Attorneys and Counsellors,
1500 Title and Trust Building, 100 Washington St.

Simeon P. Shope.
John M. Zane.
Leonard A. Busby.
Harry P. Weber.
Hayes McKinney.

Cable Address, "Zanewebber," Chicago.

CHICAGO, April 10, 1908.

$112,500 5% ten year, Serial Certificates of Indebtedness, dated February 20, 1908, of the City and County of Denver, Colorado.

We have examined a certified transcript of the record of proceedings had preliminary to the issuance of the $112,500 5% Ten Year, Serial Certificates of Indebtedness, dated February 20, 1908, of the City and County of Denver, Colorado, and in our opinion such proceedings show lawful authority to issue said certificates of indebtedness under the laws and constitution of the state of Colorado now in force.

We have also examined a copy of the form of certificate prepared for such issue; and in our opinion said certificates, to the amount named, are in legal effect the valid and binding obligations of said City and County of Denver, in its corporate character as a county, and all of the taxable property situate therein is subject to the levy of a tax to pay the same.

SHOPE, ZANE, BUSBY & WEBER.

Federal Ballot Machine Co.

PLAINTIFF'S EXHIBIT D.—G. G. T.

On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, State of Colorado, will pay to the order of the Federal Ballot Machine Company, at the

office of the County Treasurer of the City and County of
60 Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on Certificate of Indebtedness No. 1, for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER.
S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

The following appears across the face of the foregoing, partly stamped in red ink and partly in handwriting in ink:
Protested Feb'y 23, 1909, for non-payment.
GEO. O. DOSTAL,
Notary Public.

The following is endorsed on the back of the foregoing: Federal Ballot Machine, A. Andrew, Vice-Pres't.

Copy.

On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, State of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the County Treasurer of the City and County of Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on Certificate of Indebtedness No. 1 for $11,250.00.

BOARD OF COUNTY COMMISSIONERS OF
THE CITY AND COUNTY OF DENVER,
COLORADO,
By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

STATE OF COLORADO,
City and County of Denver, ss:

Be it Known, that on the 23rd day of February, in the year of our Lord nineteen hundred and nine at the request of the Denver National Bank, I, George O. Dostal, a notary public, duly admitted and sworn, dwelling in Denver, City and County of Denver, and State aforesaid, presented the original note of which the above is a true copy at the office of the County Treas'r of the City and
61 County of Denver and demanded payment thereof, which was refused; reason can not pay. Whereupon I, the said

notary, at the request aforesaid, did protest, and by these presents do solemnly protest, as well against the maker *and* endorser of the said note.

And I, the said notary, do hereby certify that on the said day and year above written, I deposited in the post office in said Denver, notice of the foregoing protest, partly written and partly printed, signed by me and folded in the form of letters, as follows, viz:

Notice for Board of County Commissioners directed Denver, Colo. Notice County Treasurer of City & Co. of Denver, Denver, Colo. Notice Federal Ballot Machine Co. directed San Francisco, Califa. Notice Home Savings Bank directed Detroit, Michigan, being their respective reputed place of residence and nearest post office thereto; and further, that on the day and year aforesaid, I served like notices of the foregoing protests, as follows, viz:

Notice for —.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal of office at Denver, aforesaid, this 23rd day of February, A. D. 1909.

[SEAL.] In Testimonium Veriates. My commission expires January 3, 1912.

[SEAL.] GEO. O. DOSTAL,
Notary Public.

Fees:

Noting and Recording.....	$1.75
4 notices @ 50.....	2.00
	$3.75

PLAINTIFF'S EXHIBIT E.—G. G. T.

Director George W. Reed offered the following resolution, which was seconded by Director Leavitt and adopted by the unanimous affirmative vote of all the Directors:

"Resolution.

Resolved, that Mr. Adam Andrew, of San Francisco, on behalf of this corporation, be and he is hereby empowered and authorized to convey, assign, sell, set over, and deliver all of the assets of this corporation consisting of good will, patent, patent rights, inventions, factory, factory site, leases and all assets excepting existing contracts,
62 upon such terms and conditions as in his judgment may seem just and fair, and to and for the best interests of this corporation, to such person, persons, or corporation as may in his judgment seem to be for the best interests of this corporation, and in that behalf he is hereby empowered to sign, execute and deliver as the act of this corporation any and all instruments and documents necessary to carry out and effectuate such sale and conveyance."

I, George W. Reed, Secretary of the Federal Ballot Machine Company, a corporation, do hereby certify that the above and foregoing

resolution was unanimously passed and adopted by the affirmative vote of the entire Board of Directors, of this corporation at a meeting of said board of directors duly and regularly called and held at the office and principal place of business of said corporation on the first day of February, 1908, and that said resolution has not been repealed, modified or set aside, and now is in full force and effect.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this corporation, this 1st day of February, 1908.

[SEAL.] GEO. W. REED,
Secretary of the Federal Ballot Machine Company.

PLAINTIFF'S EXHIBIT F.—G. G. T.

Copy.

April 30, 1908.

To Whom It May Concern:

This is to certify that Adam Andrew, Vice-President of the Federal Ballot Machine Company, is duly authorized and empowered by and on behalf of the Federal Ballot Machine Company, to endorse, deliver and dispose of all the ten Certificates of Indebtedness of the City and County of Denver, dated February 20, 1908, due one to ten years respectively after date, each in the sum of $11,250, with interest payable semi-annually at the rate of 5% per annum, all of which are payable to the order of the Federal Ballot Machine Company.

(Signed) THOMAS H. WILLIAMS,
President of Federal Ballot Machine Co.

(Signed) GEO. W. REED,
[SEAL.] *Secretary.*

This is to certify that the above and foregoing is a true and correct copy of the original certificate held by us.

ILLINOIS TRUST & SAVINGS BANK,
By WM. H. HENKLE, *Secretary.*

63 PLAINTIFF'S EXHIBIT G.—G. G. T.

No. 561.

CHICAGO, June 22, 1908.

The National City Bank of Chicago.

Pay to the order of Federal Ballot Machine Co. $11,099.99.
Eleven thousand ninety nine & 99/100 Dollars.

H. T. HOLTZ & CO.

On the back of the foregoing is the following endorsement, partly stamped in purple ink and partly in handwriting in ink:

Pay to the order of The Continental National Bank of Chicago, Federal Ballot Mch. Co. by Adam Andrew, Vice-pres't.

Paid through Chicago Clearing House 11 Jun- 24 1908 to The Continental National Bank.

PLAINTIFF'S EXHIBIT H.—G. G. T.

No. 12091.

The Home Savings Bank.

$11,355.63.

Demand.
Certificate of Deposit.

$11,355. DETROIT, MICH., Jun- 19, 1908.

Julius H. Haass Cash'r has deposited in this Bank Eleven Thousand Three Hundred Fifty-five 63/100 Dollars, payable to the order of First Nat'l Bank, Detroit in current funds, on the return of this Certificate properly endorsed.

[C. A. ZAES,]*
Ass't Cashier.

[JOHN W. SCHMITT,]* *Teller.*

Signatures cancelled by D. X. Teller, after payment.
The Home Savings Bank Building, Cor. Michigan Ave. & Griswold St.

The following appears on the back of the foregoing exhibit:
Paid through Detroit Clearing House Jun- 20 1908. All prior restrictive endorsements guaranteed, to First National Bank.

PLAINTIFF'S EXHIBIT I.—G. G. T.

H. T. Holtz & Co.
171 La Salle Street, Chicago.
Public Securities. Incorporated. Paid in Capital $100,000.

64 June 10, 1908.

First National Bank, Detroit, Mich.

DEAR SIRS: We enclose herewith Certificate of Indebtedness No. 1 of the City and County of Denver, State of Colorado, due in 1909, for $11,250 with August 1908 and February 1909 Coupons attached, together with bill against Messrs. Karl R. Davies & Co. of Detroit. Please deliver this Certificate to Messrs. Karl R. Davies & Co. on receipt of the amount named in the bill, which please remit to us less your usual charge.

Yours very truly,

H. T. HOLTZ & CO.

Encl.

[*Erased in copy.]

Attached to the above is the following written in handwriting in ink: Davies' clients require authority of Vice-Pres't to endorse for Ballot Co. also certified transcript of the record of proceedings authorizing the issuance of the Certificates of Indebtedness by City and County of Denver. Please wire instructions.

PLAINTIFF'S EXHIBIT J.—G. G. T.

H. T. Holtz & Co.,
171 La Salle Street.

CHICAGO, 6/19/08.

Home Savings Bank, Detroit, Mich.

To Certificate of Indebtedness No. 1 of the City and County of Denver, State of Colo. due in 1909, for $11,250 @ 99.30	$11,171.25
Accrued interest February 20–June 19, both incl., @ 5%	184.38
Total	$11,355.63

Received Payment,

H. T. HOLTZ & CO.,
By M. A. AUER.

I, G. G. Taylor, do hereby certify that I reported in shorthand the testimony of the witnesses in the foregoing deposition; that I have correctly reduced it to writing as hereinbefore appears and that I have caused to be inserted in the deposition the exhibits offered, by means of full, true and correct copies thereof.

G. G. TAYLOR,
Stenographic Reporter.

STATE OF ILLINOIS,
County of Cook, ss:

I, E. Bentley Hamilton, a notary public in and for the County and State aforesaid, duly appointed, qualified and acting, do
65 hereby, in pursuance of the annexed stipulation, certify that on Tuesday, the 15th day of February, 1910, and continuing until the 17th day of February, 1910, before me at my office in Room 1500, 100 Washington Street, Chicago, at the hour of 10:00 o'clock A. M. of the first named day, continuing until the hour of 10:00 o'clock A. M. of the second named day appeared the attorneys stated in the deposition, representing the respective parties hereto, and also appeared G. G. Taylor, Stenographic Reporter, who was appointed by me to take the deposition enclosed, and was then and there duly sworn to correctly report the deposition about to be taken; and also appeared before me at said time and place the following named witnesses:

Charles Howells Coffin, Fontaine Le Maistre, Ole Christian Olsen Julius H. Haass, Karl R. Davis,

each of whom was thereupon duly sworn to depose to the truth, the whole truth and nothing but the truth regarding the issues in a cause now pending in the -ircuit Court of the United States in and for the District of Colorado, wherein the Home Savings Bank is plaintiff and the Board of County Commissioners of the City and County of Denver is defendant.

Whereupon, each of the said witnesses was examined on oral interrogatories, by the said counsel for the respective parties and the questions and answers thereto were taken down by the said stenographer, with the objections as the same were made, and by him were reduced to typewriting, the signatures to said depositions by the respective witnesses having been waived by counsel for the respective parties appearing before me. And said depositions, so taken having been sworn to are herein contained as the same were taken, which said depositions with the original stipulation for the taking of the same I have attached to this certificate and have deposited in the mail, postage prepaid, directed to Charles W. Bishop, Esquire, Clerk of the Circuit Court of the United States within and for the District of Colorado, at the City of Denver, Colorado.

I also certify that in pursuance of the agreement of counsel for the respective parties made before me that the documentary evidence noted in said depositions and introduced by counsel was identified by the mark of the exhibit number and the initials of said stenographer, and offered in evidence and admitted and truly and accurately copied by the said stenographer, who has in-
66 serted such copies in the said deposition, and the original documents have been retained by the parties, subject to the production of the same in court upon the trial of this action if called for.

In Witness Whereof, I have hereunto set my hand and official seal this 17th day of February, A. D. 1910, at Chicago, Illinois.

[SEAL.] E. BENTLEY HAMILTON,
Notary Public.

Notary's fees $72 05/100 Paid by The Home Savings Bank.

And thereupon the plaintiff rested its case.

And the defendant offered no evidence in its behalf.

And thereupon the defendant, by its counsel, moved the Court for a non suit based upon the questions of law already raised by the defendant in the motion to strike parts of the complaint and again raised in demurrer to the answer.

Which motion was by the Court denied.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant, by its counsel, moved the Court for a directed verdict on its behalf.

Which motion was by the Court denied.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant rested its case.

And the above and foregoing is all the evidence given, offered or received upon the trial of said cause.

And thereupon the plaintiff, by its counsel, moved for a directed verdict on its behalf in the sum of $12,374.76 on both counts.

The COURT: Verdict, of course, will be directed for the plaintiff. Enter judgment for plaintiff, as on the verdict of the jury, for $12,374.76 and for costs.

To which ruling of the Court in directing a verdict for plaintiff, and to the entry thereof, and to the entry of judgment thereon, separately, the defendant, by its counsel, then and there duly excepted.

And thereafter and on to-wit, the 5th day of August, A. D. 1910, the defendant filed in said court a motion for a new trial, for the following reasons, to-wit:

67 1. That the court erred in denying defendant's motion to strike from the complaint the word "negotiable" as used in line 7, line 14 and line 19 on page 2; line 24 and line 31 on page 3; line 15 and line 23 on page 4; and line 27 on page 5 of said complaint.

2. The court erred in overruling the defendant's motion to strike out the following language found on page 3 of said complaint to-wit:

"Thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75)."

3. The court erred in overruling the defendant's motion to strike out the following language found on page 6 of said complaint, to-wit:

"And thereupon said interest coupon was duly protested for non-payment and the plaintiff paid protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75)."

4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.

5. The court erred in ruling that the instruments sued on in the complaint were negotiable.

6. The court erred in overruling the defendant's motion for a non-suit.

7. The court erred in overruling the defendant's motion for a directed verdict.

8. The court erred in granting plaintiff's motion for a directed verdict.

9. That the verdict is contrary to the evidence, and the judgment is contrary to law.

Which said motion for a new trial was by the court overruled.

To which ruling of the court the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant asked and was granted thirty (30) days in which to file its bill of exceptions.

And now, forasmuch as the above and foregoing matters and things do not appear fully of record, the defendant tenders
68 this, its bill of exceptions, by it reserved herein, and prays that the same may be signed and sealed by the Judge of this court, and made a part of the record in said cause, pursuant to the statute in such case made and provided; which is accordingly done on this 1st day of September, A. D. 1910.

ROBT. E. LEWIS,
District Judge.

Approved:
C. W. WATERMAN,
Attorney for Plaintiff.

Endorsed: 5388. U. S. Circuit Court, District of Colorado. The Home Savings Bank vs. The Board of County Commissioners of the City and County of Denver. Defendant's Bill of Exceptions. Filed Sep. 1, 1910, Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States.

THE HOME SAVINGS BANK, Plaintiff,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Petition for Writ of Error.

Comes now the Board of County Commissioners of the City and County of Denver, the defendant above named, by Milton Smith, Charles R. Brock and W. H. Ferguson, its attorneys, and alleges:

That on or about the second day of August, A. D. 1910, this court entered judgment in the above entitled case in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will in more detail appear from the assignment- of error, filed with this petition and made part hereof.

Wherefore this defendant prays that a writ of error may be issued in its behalf out of the United States Circuit Court of Appeals of the Eighth Judicial District for the correction of the errors so complained of, and that a transcript of the record and papers in this case, duly authenticated, may be sent to the said circuit court of appeals.

MILTON SMITH,
CHAS. R. BROCK,
WM. F. FERGUSON,
Attorneys for Defendant.

69 Endorsed: No. 5388. In the Circuit Court of the United States. The Home Savings Bank, Plaintiff, v. The Board of County Commissioners of the City and County of Denver, Defendant. Petition for Writ of Error. Filed Sep. 30, 1910. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, W. F. Ferguson, Attorneys for defendant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States within and for said District.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Assignments of Error.

Comes now the defendant by Milton Smith, Charles R. Brock and W. H. Ferguson, its attorneys, and makes the following assignments of error which it avers occurred on the trial of this cause, to-wit:

1. That the court erred in denying defendant's motion to strike from the complaint the word "negotiable" as used in line 7, line 14 and line 19 on page 2; line 24 and line 31 on page 3; line 15 and line 23 on page 4, and line 27 on page 5 of said complaint.

2. The court erred in overruling defendant's motion to strike out the following language found on page 3 of said complaint, to-wit:

Thereupon the said negotiable bond or certificate of indebtedness was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents ($3.75).

3. The court erred in overruling defendant's motion to strike out the following language found on page 6 of said complaint, to-wit:

And thereupon said interest coupon was duly protested for non-payment and the plaintiff paid the protest fees on account thereof in the sum of three dollars and seventy-five cents. ($3.75).

4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.

70 5. The court erred in ruling that the instruments sued on in the complaint were negotiable.

6. The court erred in overruling defendant's motion for a non-suit.

7. The court erred in overruling defendant's motion for a directed verdict.

8. The court erred in granting plaintiff's motion for a directed verdict.

9. That the verdict was contrary to the evidence.

10. That the judgment is contrary to law.

Wherefore this defendant prays that the judgment may be re-

versed and this action be dismissed and that it be given a judgment for its costs herein expended.

MILTON SMITH,
CHAS. R. BROCK,
WM. H. FERGUSON,
Attorneys for Defendant.

Endorsed: 5388. In the Circuit Court of the United States within and for the District of Colorado. The Home Savings Bank, Plaintiff, v. The Board of County Commissioners of the City and County of Denver, Defendant. Assignments of Error. Filed Sep. 30, 1910. Charles W. Bishop, Clerk. Milton Smith, Charles R. Brock and W. H. Ferguson, Attorneys for defendant.

Sixty-eighth Day, May Term, Friday, September 30th, A. D. 1910.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the third day of May, A. D. 1910.

5388.

THE HOME SAVINGS BANK
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER.

Money Demand.

The above cause coming on to be heard upon the petition of the defendant for a writ of error from the United States Circuit Court of Appeals of the Eighth Judicial Circuit to the United States Circuit Court for the District of Colorado, and upon the examination of said petition, the assignments of error presented therewith and the record in said cause, and desiring to give the petitioner an opportunity to prosecute in the said United States Circuit Court of Appeals, the questions presented by the record in said cause;

71 It is ordered that a writ of error be, and the same is hereby allowed to this court from the United States Circuit Court of Appeals of the Eighth Judicial Circuit, and the bond presented by the said petitioner in the penal sum of $15,000 [*has*] heretofore fixed by order of this court, be, and the same is hereby, approved.

Bond on Writ of Error.

THE UNITED STATES OF AMERICA,
District of Colorado:

Know All Men By These Presents, That we, The Board of County Commissioners of the City and County of Denver, state of Colorado, as principal, and The Empire State Surety Company of New York as surety, are held and firmly bound unto The Home Savings Bank,

in the full and just sum of fifteen thousand ($15,000.00) dollars to be paid to the said The Home Savings Bank, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of September, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at the May term, A. D. 1910, of the United States Circuit Court, for the District of Colorado, sitting at Denver, in a suit pending in said court between The Home Savings Bank, a corporation, plaintiff, and The Board of County Commissioners of the City and County of Denver, state of Colorado, defendant, judgment was rendered against the said defendant in the sum of twelve thousand three hundred seventy-four and 76/100 ($12374.76) dollars, and the said The Board of County Commissioners of the City and County of Denver having obtained a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the judgment of the said Circuit Court; and a citation directed to the said The Home Savings Bank, citing and admonishing it to be and appear, in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said The Board of County Commissioners of the City and County of Denver, state of Colorado, shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make
72 good its plea, then the above obligation to be void, else to remain in full force and virtue.

[Seal, City and County of Denver.]

THE BOARD OF COUNTY COMMISSIONERS
OF THE CITY AND COUNTY OF DENVER,
By W. P. QUARTERMAN, *Chairman.*

Attest:
FRED W. BAILEY, *Clerk,*
By CHAS. W. COCHRAN, *Deputy.*

THE EMPIRE STATE SURETY COMPANY,
By JOHN R. GEMMILL,
Its Attorney-in-Fact.

[Corporate seal, Empire State Surety Company.]

Approved:
ROBT. E. LEWIS, *Judge.*

Endorsed: 5388. The Empire State Surety Company of New York. The Home Savings Bank vs. The Board of County Commissioners of the City and County of Denver. Bond on Appeal $15000.00. Filed Sep. 30, 1910. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States.

THE HOME SAVINGS BANK, Plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Defendant.

Præcipe.

The clerk will prepare in the above entitled cause an authenticated copy of the entire record, including the complaint, summons, motion to strike parts of the complaint, answer, demurrer to the answer, amended answer, demurrer to the amended answer, replication, verdict, final judgment, motion for new trial, petition for writ of error, assignment of errors, bond on writ of error, order allowing writ of error, this præcipe, writ of error, citation, and every other pleading, motion or order filed or entered herein.

MILTON SMITH,
CHAS. R. BROCK,
WM. H. FERGUSON,
Attorneys for Defendant.

73 Endorsed: No. 5388. In the Circuit Court of the United States. The Home Savings Bank, Plaintiff, vs. The Board of County Commissioners of the City and County of Denver, Defendant. Præcipe for Transcript of the Record on Writ of Error to U. S. Circuit Court of Appeals. Filed Sep. 30, 1910. Charles W. Bishop, Clerk. Milton Smith, Chas. R. Brock, Wm. F. Ferguson, Attorneys for Defendant.

Writ of Errors, U. S. Circuit Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Colorado, Greeting:

Beacuse in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you at the May Term, 1910, thereof, between The Home Savings Bank, plaintiff, and The Board of County Commissioners of the City and County of Denver a manifest error hath happened, to the great damage of the said The Board of County Commissioners of the City and County of Denver as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office

of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 29th day of November, 1910, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable John M. Harlan, Associate Justice of the United States, this 30th day of September, in the year of our Lord, one thousand nine hundred and ten, and of the Independence of the United States, the 135th year.

74 Issued, at office in the city and county of Denver, in said district, with the seal of the circuit court of the United States for the district of Colorado, and dated as aforesaid.

[Seal U. S. Circuit Court, Dist. of Colorado.]

CHARLES W. BISHOP,
Clerk United States Circuit Court
District of Colorado.

Allowed by
ROBT. E. LEWIS, *Judge.*

Return.

THE UNITED STATES OF AMERICA,
District of Colorado, ss:

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of the circuit court of the United States for the district of Colorado, at the city and county of Denver, in said district, this twenty-sixth day of October, 1910.

[Seal U. S. Circuit Court, Dist. of Colorado.]

CHARLES W. BISHOP, *Clerk.*

No. 5388. United States Circuit Court of Appeals Eighth Circuit. The Board of County Commissioners of the City and County of Denver Plaintiff in Error vs. The Home Savings Bank, Defendant in Error. Writ of Error. Filed Sep. 30 1910. Charles W. Bishop, Clerk.

Citation on Writ of Error, U. S. Circuit Court of Appeals

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Circuit.

The United States of America to The Home Savings Bank, Greeting:

75 You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth

Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Colorado, sitting at Denver, wherein The Board of County Commissioners of the City and County of Denver is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Robert E. Lewis, Judge of the District Court of the United States for the District of Colorado and ex officio Judge of the Circuit Court of the United States for the District of Colorado, at Denver, in said District, this thirtieth day of September, A. D. 1910.

ROBERT E. LEWIS, *Judge.*

Proof of Service.

Received a copy of within Citation at Denver, Colo. this 30th day of Sept. 1910.

THE HOME SAVINGS BANK,
By CHARLES W. WATERMAN,
Its Att'y.

No. 5388. United States Circuit Court of Appeals, Eighth Circuit. The Board of County Commissioners of the City and County of Denver, Plaintiff in Error, vs. The Home Savings Bank, Defendant in Error. Citation. Filed Sep. 30, 1910. Charles W. Bishop, Clerk.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the Circuit Court of the United States for the District of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to one hundred and three (103), both inclusive, to be a true, perfect, and complete transcript and copy of the pleadings and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe, and defendant's bill of exceptions, heretofore filed or entered of record in said court and in a certain case lately in said court pending, wherein The Home Savings Bank was plaintiff and the
76 Board of County Commissioners of the City and County of Denver was defendant as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this twenty-sixth day of October, A. D. 1910.

[Seal U. S. Circuit Court, Dist. of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Filed Dec. 23, 1910. John D. Jordan, Clerk.

77 (*Appearance of Counsel for Plaintiff in Error.*)

On the third day of January, A. D. 1911, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
HOME SAVINGS BANK.

The Clerk will enter our appearance as Counsel for the Plaintiff in Error.

MILTON SMITH.
CHAS. R. BROCK.
WM. H. FERGUSON.

824 Equitable Bldg., Denver, Colo.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3526. Board of County Commissioners of the City & County of Denver, Plaintiff in Error, vs. Home Savings Bank. Appearance. Filed Jan. 3, 1911, John D. Jordan, Clerk. Milton Smith, Charles R. Brock, William H. Ferguson, Counsel for Pl't'f in Error.

(*Appearance of Counsel for Defendant in Error.*)

And on the eighth day of February, A. D. 1911, the appearance of counsel for defendant in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

78 The Clerk will enter my appearance as Counsel for the Defendant in Error.

CHARLES W. WATERMAN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3526. The Board of Co. Commissioners of the City & County of Denver, Plaintiff in Error, vs. The Home Savings Bank. Appearance. Filed Feb. 8, 1911, John D. Jordan, Clerk. Charles W. Waterman, Counsel for Defendant in Error.

(*Order of Submission.*)

And on the twenty-fifth day of September, A. D. 1911, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1911, Monday, September 25, 1911.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause having been called for hearing in its regular order, argument was commenced by Mr. W. H. Ferguson for plaintiff in error, continued by Mr. Charles W. Waterman for defendant in error and concluded by Mr. W. H. Ferguson for plaintiff in error. Thereupon, this cause was submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-fourth day of August, A. D. 1912, the opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

79 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1912.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. W. H. Ferguson (Mr. Milton Smith and Mr. Charles R. Brock on the brief), for plaintiff in error.
Mr. Charles W. Waterman, for defendant in error.

Before Adams and Smith, Circuit Judges, and Reed, District Judge.

REED, District Judge, delivered the opinion of the court:

The Home Savings Bank, a Michigan banking corporation, which will be called the plaintiff, sued the City and County of Denver, a municipal corporation of Colorado, which will be called the defendant, to recover the amount of a certificate of indebtedness issued by its Board of Commissioners February 20, 1908, to the order of the Federal Ballot Machine Company an alleged corporation of California, which will be called the Machine Company, for $11,250, payable in one year, with interest from date at the rate of five per cent. payable semi-annually. There was a verdict and judgment for the plaintiff, and the defendant brings error.

The complaint alleges that on February 20, 1908, the defendant made and delivered to the machine company its negotiable bond or certificate of indebtedness, payable to the order of the machine company at the office of the treasurer of the defendant in one year for $11,250, with interest from date, payable semi-annually as per coupons attached, which said instrument it is alleged the machine company sold, endorsed and delivered to the plaintiff for value before maturity. The certificate of indebtedness, and second coupon are set out in the complaint and are as follows:

80 *Certificate of Indebtedness.*

"$11,250.00. No. 1.

"City and County of Denver, State of Colorado.

"The Federal Ballot Machine Company having presented its claim, for furnishing ballot machines, against the City and County of Denver, in the sum of eleven thousand two hundred and fifty dollars and the same having been allowed at a regular meeting of the Board of County Commissioners of the City and County of Denver, state of Colorado, on the seventeenth day of February, 1908, *and* the Board of County Commissioners, being authorized thereto by the laws of the state of Colorado, Act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached. Interest and principal payable at the office of the County Treasurer of the City and County of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

"Signed by the Board of County Commissioners of the City and County of Denver, of the state of Colorado, by its chairman, and attested by the county clerk and recorder with the seal of the county, authorized thereto by resolution of the 20th day of February, 1908.

"Denver, Colorado, February 20th, 1908."

The instrument is endorsed as follows: "Pay to the order of The Home Savings Bank, Detroit, Mich. Federal Ballot Mach. Co. A. Andrew, Vice Prest."

Coupon No. 2 attached to the instrument is as follows:

"On the 20th day of February, 1909, the Board of County Commissioners of the City and County of Denver, state of Colorado, will pay to the order of The Federal Ballot Machine Company, at the office of the county treasurer of the City and County of Denver, Colorado, two hundred eighty-one and one quarter dollars, being six months' interest to that date on certificate of indebtedness No. 1 for $11,250.0.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, COLORADO,
By S. D. C. HAYS, *Chairman.*

Attest:
ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado.

Endorsed: Federal Ballot Mach. A. Andrew, Vice Pres't."

81 It is alleged that on the 23rd day of February, 1909, both instruments were presented to the treasurer of the defendant and payment demanded which was refused; that plaintiff thereupon caused them to be protested for non-payment, and paid $7.50 protest fees therefor. Judgment is asked against the defendant for the amount of said instruments with interest, and for the protest fees.

To this complaint the defendant filed a motion to strike therefrom the word "negotiable" where it appears therein, also the allegation that the instruments were protested, and plaintiff paid $7.50 as fees therefor; upon the ground that the word "negotiable" is but an expression of an erroneous legal conclusion as to the character of the certificate of indebtedness; that it affirmatively appears that the instruments sued upon are not negotiable; that neither could be legally protested, and the allegations of the complaint as to the payment of protest fees, are wholly irrelevant and immaterial. This motion was denied, but no exception was taken to the ruling, and the defendant was given twenty days thereafter in which to answer. Within such twenty days the defendant answered, and later, on January 5, 1910, filed an amended answer alleging three defenses to the complaint as follows:

First Defense: That it has not sufficient knowledge or information upon which to base a belief as to whether or not the Machine Company negotiated, transferred, endorsed, or delivered to the plaintiff for value or otherwise, the instruments sued upon; or as to whether the plaintiff is the owner of said instruments.

Second Defense: That the consideration for the execution of both the certificate of indebtedness and interest coupon mentioned in the complaint, has wholly failed, in that said certificate of indebtedness

was executed in part payment for 150 voting machines known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May, 1907, whereby the Machine Company agreed and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines as required by said laws; that said machines do not conform to the constitution and statutes of Colorado, and do not accurately perform the work required by said constitution and laws; that in the use of said machines the secrecy of the ballot cannot be preserved; that the mechanism of the machines is so intricate and complicated that it is impossible for an elector by the use of said machines to vote a straight ticket, a mixed ticket, or an irregular ticket or any of them, and it is impossible for an elector by the use of said machines secretly to vote a split or irregular ticket; that their construction is such that an elector cannot cast a vote for
82 presidential electors without first divulging the names of the persons for whom he desires to vote, and it is impossible for an elector to vote for any particular elector; and that said machines are without any value whatever.

Upon information and belief it is alleged that the Machine Company is and was at the institution of the action the beneficial owner of the certificate of indebtedness and interest coupon set forth in the complaint; that neither thereof was before maturity, or at any time, in good faith and in due course of business negotiated, sold or transferred by the Machine Company or by any one to the plaintiff; that any transfer or delivery thereof, if any was ever at any time made, was for the sole purpose of enabling the plaintiff in its own name to prosecute this action for the purpose of thereby defeating the defense which the Machine Company knew existed against itself, and of which the plaintiff had notice prior to any alleged negotiation, transfer or delivery thereof to it.

The third defense is the same as the second, except that it omits the second part of paragraph of the second defense beginning with the words, "Upon information and belief" that the Machine Company is and was the owner of the instrument sued upon, etc.

The plaintiff demurred to each of these defenses upon the ground that none of them states any facts sufficient to constitute a defense to either the certificate of indebtedness or coupon set forth in the complaint. The demurrer was overruled, as to the first and second defenses, and sustained as to the third, January 27, 1910. No exception was taken by the defendant to the ruling. The plaintiff thereupon replied to the first and second defenses denying all of the allegations thereof; and upon the trial, which began August 2, 1910, offered and introduced testimony that it purchased the instruments sued upon in good faith, before maturity and for value, without notice of any defense thereto. The defendant offered no evidence, but at the close of the plaintiff's evidence moved for "a non-suit upon questions of law raised by defendant in the motion to strike parts

of the complaint," which motion was denied. The defendant then moved for a directed verdict in its favor, but stated no ground therefor, which motion was also denied, and to these rulings the defendant at the time excepted.

The plaintiff then moved for a directed verdict in its favor for the amount due upon the certificate of indebtedness and coupon sued upon, which motion was sustained and judgment rendered for the plaintiff against the defendant for the amount of said instruments and costs, to which ruling and judgment the defendant excepted.

A motion for new trial was afterwards made and denied, and the defendant excepted.

83 The defendant assigns as error that the Circuit Court erred, (1) in overruling its motion to strike from the complaint the word "negotiable" and the allegations of the protest of the instruments sued upon; (2) in sustaining the demurrer to the third defense alleged in its answer; (3) in ruling that the instruments sued upon were negotiable; (4) the denial of its motions for non-suit and for a directed verdict in its favor and (5) in rendering judgment for the plaintiff.

In argument the defendant contends:

1. That neither Sec. 8 of Article VII of the constitution of Colorado, nor the act of 1905, authorized the Board of County Commissioners of the City and County of Denver to issue negotiable certificates of indebtedness, and that the certificate and coupon sued upon were negotiable in form, and therefore void.

2. That even if the constitutional provision and statute in question should be held to authorize the issuance of negotiable bonds, the securities sued on in this action are not bonds, were never intended to be negotiable, and are not negotiable; and the plaintiff took them subject to any equities existing between the county and the payee.

Sec. 8, Art. VII of the constitution of Colorado was amended November 6, 1906, to read in this way, as set forth in the brief of counsel for defendant:

"All elections by the people shall be by ballot, and in case paper ballots are required to be used, every ballot shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested elections, in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting be preserved.

"When the governing body of any county, city, city and county or town, including the City and County of Denver, and any city,

city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine or voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness or other obligations, which shall be a charge upon such city, city and county or town; such bonds, certificates or other
84 obligations may be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par."

April 10, 1905, the legislature of Colorado passed an act (Sec. 2342, Rev. Stat. Col. 1908) identical with Sec. 8, Art. VII of the constitution as amended, authorizing the use of voting machines at elections, to be effective on and after December 13, 1906, in the event only that the amendment of Sec. 8, Art. VII of the constitution should be adopted by the people at the general election in 1906; which amendment was so adopted.

We are of opinion that the record does not present the question urged by the defendant as above stated for our determination. The record shows that the defendant first moved the Circuit Court to strike from the complaint the word "negotiable" where it appears therein, and the averment of the protest of the instruments and the payment of the protest fees, upon the ground that the former was but a statement of an erroneous legal conclusion, and the latter because it affirmatively appeared that the instruments sued upon are not negotiable and could not legally be protested, and were, therefore, wholly irrelevant and immaterial. The motion was denied and defendant given twenty days in which to answer, but it saved no exception to the ruling. Within the twenty days defendant filed an answer to the complaint and later an amended answer. The answers were waivers of the alleged errors, if any, in the ruling upon the motion, even if the ruling had been excepted to. Travelers' Ins. Co. v. Redfield, 6 Colo. App. 196 (40 Pac. 195-197); Cerussite Mining Co. v. Anderson, 19 Colo. App. 307 (75 Pac. 158-159); Enright v. Midland Sampling & Ore Co., 33 Colo. 341 (80 Pac. 1041).

The word "negotiable" might well have been eliminated, or omitted originally, from the complaint without affecting in any way its legal sufficiency, for the instrument to which it referred was set forth in full in the complaint. Its nature and character thus appeared upon its face, and the allegation that it was "negotiable" could not and did not change its legal effect. The word was therefore mere surplusage and did not affect the issues. The motion to strike the averment of the protest and payment of the fees is made to rest upon the ground that "it affirmatively appears" that the instruments were not "negotiable" and could not, therefore, be legally protested. But the instruments upon their face are negotiable. There was no prejudicial error, therefore, in denying the motion, even if the proper exception had been saved to the order overruling it.

The authority of defendant's Board of Commissioners under the law of Colorado, to issue negotiable certificates of indebtedness, or the validity in its inception of the instrument sued upon was chal-

lenged in the Circuit Court, if at all, only by the demurrer to the third defense of the answer. The demurrer to that defense
85 was sustained, upon what ground does not appear, but no exception was saved to the ruling. Admitting without deciding, that the third defense raised the issue of the want of authority of the Board of Commissioners to issue the certificate as a negotiable instrument, or the legality of the instrument in its inception, the defendant, if it desired to test the correctness of the ruling sustaining the demurrer, should have excepted thereto at the time. This it did not do.

The Civil Code of Colorado provides:

SEC. 74. "When a demurrer is decided, either in term time or vacation, the court or judge shall immediately cause the decision thereof to be entered in the record, and may proceed to final judgment thereon in favor of the successful party, unless the unsuccessful party shall plead over or amend upon such terms as may be just, and the court or judge may fix the time for pleading over and filing amended pleadings; and if the same be not filed within the time so fixed, judgment by default may be entered as in other cases."

The purpose of this section is to prescribe the duty of the court or judge when a demurrer is decided. Anthony v. Slayden, 27 Colo. 144 (60 Pac. 826).

If it be said that judgment was not entered until after the trial and was then excepted to, the sufficient answer is, that the insufficiency of the third defense was determined by the ruling upon the demurrer thereto several months before, which was final in the Circuit Court, unless the defendant was allowed to amend, which it did not request nor the court allow, and no exception was then taken to the ruling. There is nothing, however, in any of the defenses that challenges the authority of the Board of Commissioners to issue the certificate of indebtedness as a negotiable instrument nor the legality or validity of the instrument in its inception, and it does not affirmatively appear from the record that either of these questions was ever presented to or determined by the Circuit Court. This court will not, therefore, consider or determine them. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133-140 (52 C. C. A. 95; Hatcher v. Northwestern Nat. Ins. Co., 184 Fed. 23-25 (106 C. C. A. 225).

The office of an exception, in practice, is to challenge the correctness of the rulings or decisions of the trial court promptly when made, to the end that errors in such rulings may be corrected by the court itself, if, upon its attention being called thereto, it deems them to be erroneous; and to lay the foundation for their review if necessary, by the proper appellate tribunal. In the courts of the United States such an exception, taken immediately upon the ruling being made is indispensable to a review by the proper appellate court of the ruling. Railway Co. v. Heck, 102 U. S.
86 120; Newport News, etc., Ry. Co. v. Pace, 158 U. S. 36; Potter v. United States, 122 Fed. 49, 55 (58 C. C. A. 231).

In its second defense the defendant alleged the failure of the consideration for the certificate of indebtedness, or a breach of the guarantee of the Machine Company of the voting machines, as in

its third defense, and that plaintiff was not in good faith the owner of the instruments sued upon, but was prosecuting the action for the benefit of the Machine Company with knowledge of the defense thereto as against that company. This, if true, would be a good defense to the action, even if the defendant's Board of Commissioners were authorized to issue the certificate of indebtedness as a negotiable instrument. It was, therefore, open to the defendant to prove upon the trial, if it could do so, its second defense, but it made no attempt or offer to do so and moved for a nonsuit upon questions of law raised by "its motion previously made to strike parts of the complaint." But this motion did not challenge the legal sufficiency of the complaint to support a judgment for the plaintiff; for if the instrument had in fact been non-negotiable, as defendant contends that it was, the plaintiff would have been entitled to recover thereon in the absence of proof by the defendant of the failure of consideration.

A compulsory nonsuit, however, is not allowed in the courts of the United States, except where a statute of the state authorizes it. Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24-39; Coughran v. Bigelow, 164 U. S. 301-307; the practice of directing a verdict for the defendant when the evidence is clearly insufficient to support a verdict for the plaintiff having taken its place. In fact the difference between a compulsory nonsuit and a directed verdict for the defendant is matter of form rather than of substance, except that in case of the former a new action may be brought, while in the case of a directed verdict and judgment thereon the action is ended unless a new trial is granted upon motion or on appeal. Oscanyon v. Arms Co., 103 U. S., 261-264; Hammergen v. Schuermier, 1 McCrary, 436 (Mr. Justice Miller). We are not referred to any statute of Colorado authorizing a compulsory nonsuit; but if there be such, the plaintiff gave evidence in support of its cause of action which, in the absence of proof by the defendant sustaining its second defense, or even if the instrument was not negotiable, would entitle the plaintiff to recover. There is nothing, therefore, upon which to base defendant's motion for nonsuit; and a directed verdict in its favor upon the evidence, clearly, would have been error. Both Motions were, therefore, properly denied.

87 The denial of the motion for new trial is not, of course, sufficient upon which to base a writ of error. Railway Co. v. Heck, 102 U. S. 120.

The judgment of the Circuit Court, is therefore, affirmed.

Filed August 24, 1912.

88 (*Judgment.*)

And on the second day of September, A. D. 1912, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1912, Monday, September 2, 1912.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Colorado, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that The Home Savings Bank have and recover against The Board of County Commissioners of the City and County of Denver the sum of twenty dollars for its costs herein and have execution therefor.

September 2, 1912.

(*Petition of Plaintiff in Error for a Rehearing.*)

And on the third day of October, A. D. 1912, a petition of the plaintiff in error for a rehearing was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK, Defendant in Error.

89 In Error to the Circuit Court of the United States for the District of Colorado.

Come now the board of county commissioners of the city and county of Denver, the plaintiff in error in the above entitled action, and petitions the court to grant a rehearing of this case, for the following reasons:

The court has erroneously refused to decide the merits of this controversy upon the ground that no exception was taken by the plaintiff in error to the ruling of the trial court upon the demurrer to the third defense of the answer. In thus announcing that the failure of the defendant to except to the ruling of the trial court

upon a demurrer precludes a review of that ruling by this tribunal, a most damaging error is committed. A practice which has prevailed from time immemorial is repudiated, or at least ignored. An innovation in conflict with the decisions of the supreme court of the United States and the common law rule controlling such matters, is established. The court utterly disregards the real office of a bill of exceptions, and unwittingly confuses matters which are already in the record, and which are and have always been subject to review without a bill of exceptions, with those matters which do not in the first instance constitute a part of the record, and which can only be brought into the record in the manner prescribed by statute.

The demurrer to the third defense of the answer and the issue of law raised thereby comprehended the only question urged in this or the trial court—that is, with respect to the negotiability of the certificate upon which the action is based. By the demurrer to the third defense, that question was raised upon the record. The ruling thereon being one of law, and constituting a part of the record proper, is subject to review in this court without a bill of exceptions. Such a ruling was subject to review from the earliest history of the writ of error, and was constantly and continually reviewed prior to the time when, in the reign of Edward I, the first statute in England was enacted, which afforded the means of bringing into the record by bill of exceptions matters which were not originally a part thereof. Without any reference to the common law rule, or the decisions of the supreme court, and without showing
90 any reason either upon principle or authority for so doing, the opinion, as written, overrules a practice which has prevailed for centuries. In principle, there is no necessity for this departure, which can only serve to increase the burdens of the profession, without in any respect facilitating the proper disposition of causes.

Wherefore, your petitioner prays that a rehearing may be granted herein, and in conformity with the previous practice a decision had upon the merits of the third defense of the answer, and, if it be found that said defense is sufficient in law, the judgment of the circuit court reversed.

W. H. BRYANT,
City Attorney;
MILTON SMITH,
W. H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Plaintiff in Error.

I certify that in my judgment the above petition is well founded in law, and should be sustained.

I further certify, that said petition is not interposed for delay, but is filed in good faith, and solely that justice may be done.

September 18, 1912.

CHARLES R. BROCK,
Of Counsel for Plaintiff in Error.

(Endorsed:) Filed Oct. 3, 1912, John D. Jordan, Clerk.

(*Order Denying Petition for a Rehearing.*)

And on the sixth day of December, A. D. 1912, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petition for a rehearing in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1912, Friday, December 6, 1912.

91 No. 3526.

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
vs.
THE HOME SAVINGS BANK.

In Error to the Circuit Court of the United States for the District of Colorado.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby denied.

December 6, 1912.

92 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein the Board of County Commissioners of the City and County of Denver is Plaintiff in Error and The Home Savings Bank is Defendant in Error, No. 3526, as full, true and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of January, A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

93 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3526.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, Plaintiff in Error,
v.
THE HOME SAVINGS BANK, Defendant in Error.

Stipulation.

It is hereby stipulated, that the transcript already filed in the Clerk's office of the supreme court of the United States, with the petition for writ of certiorari, be taken as a return to said writ. Dated this 2nd day of April, A. D. 1913.

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Counsel for the Board of County Commissioners of the City and County of Denver.
CHARLES W. WATERMAN,
Counsel for The Home Savings Bank.

(Endorsed:) No. 3526. In the United States Circuit Court of Appeals, Eighth Circuit. Board of County Commissioners of the City and County of Denver, Plaintiff in Error, v. The Home Savings Bank, Defendant in Error. Stipulation as to Return to Writ of Certiorari. Filed Apr. 24, 1913. John D. Jordan, Clerk.

94 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Board of County Commissioners of the City and County of Denver is plaintiff in error, and The Home Savings Bank is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Colorado, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do
95 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of th
United States, the 5th day of April, in the year of our Lord on
thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

96 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari an
in pursuance of the stipulation of the parties, a full, true and com
plete copy of which is hereto attached, I hereby certify that th
transcript of record furnished with the application for a writ
certiorari in the case of The Board of County Commissioners of th
City and County of Denver, Plaintiff in Error, vs. The Home Saving
Bank, is a full, true and complete transcript of all the pleadings, pr
ceedings and record entries in said cause.

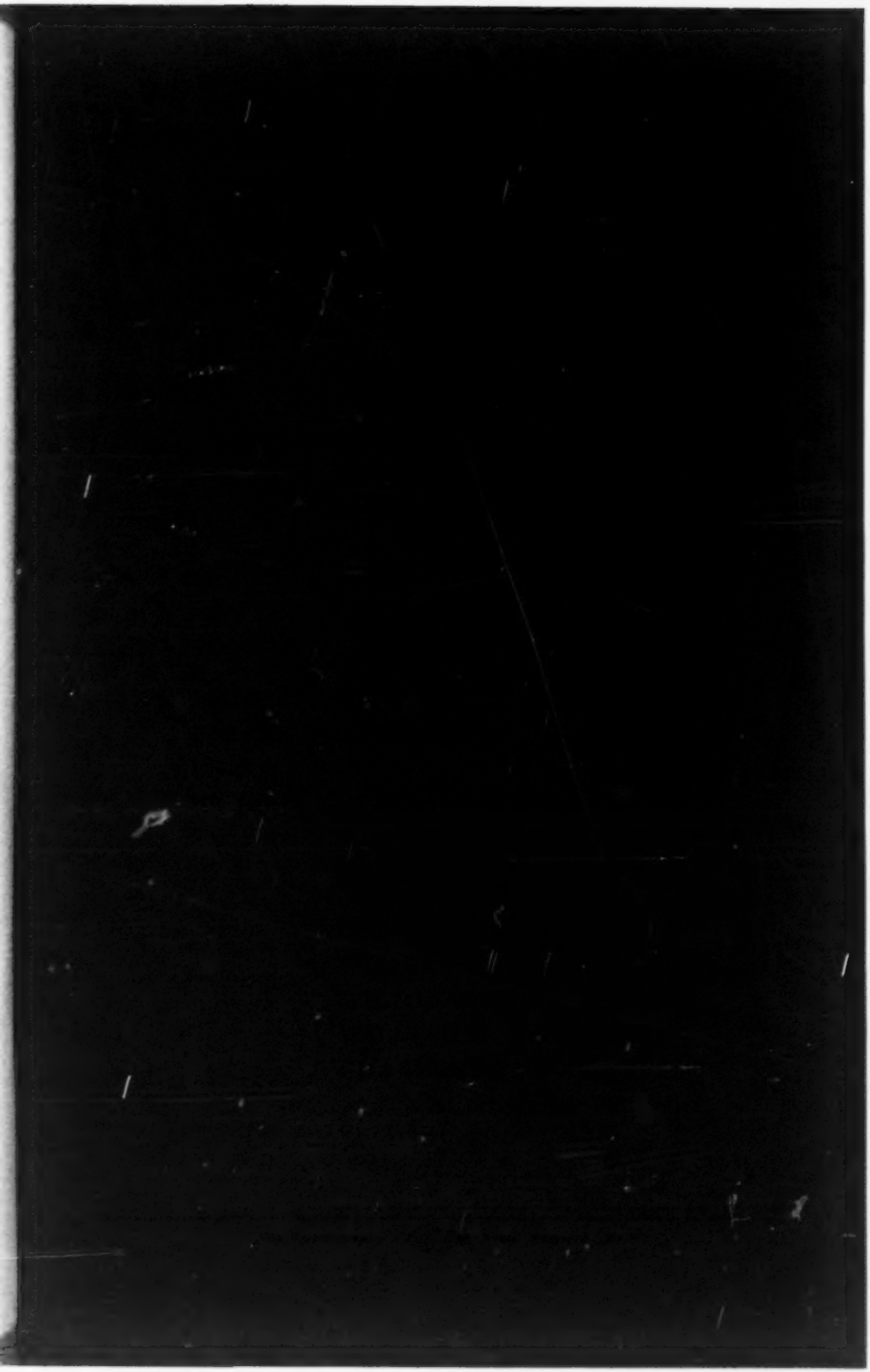
In testimony whereof, I hereunto subscribe my name and affix th
seal of the United States Circuit Court of Appeals for the Eighth Ci
cuit, at office in St. Louis, Missouri, this twenty-fourth day of Apri
A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.

[Endorsed:] File No. 23,585. Supreme Court of the Unite
States. No. 1010, October Term, 1912. The Board of County Com
missioners of the City and County of Denver vs. The Home Saving
Bank. Writ of Certiorari. Filed Apr. 24, 1913. John D. Jordan
Clerk.

97 & 98 [Endorsed:] File No. 23,585. Supreme Court U. S
October Term, 1912. Term No. 1010. The Board
County Commissioners of the City and County of Denver, Petitioner
vs. The Home Savings Bank. Writ of Certiorari and Return
Filed April 26, 1913.



United States Circuit Court of Appeals
EIGHTH CIRCUIT

No. 3526.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PLAINTIFF IN ERROR,

v.

THE HOME SAVINGS BANK, DEFENDANT IN ERROR.

NOTICE.

The defendant in error is hereby notified that the plaintiff in error will on MONDAY, the 17th day of March, A. D. 1913, upon its verified petition, and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which, and a petition for certiorari and brief in support thereof, are hereby delivered to you, to the Supreme Court of the United States, in its court-room in the Capitol, in the city of Washington, D. C.

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Plaintiff in Error.

The foregoing notice is hereby accepted, and delivery of a copy thereof and of the petition for writ of certiorari and brief in support of the petition, are hereby acknowledged. Dated February 19, 1913.

CHARLES W. WATERMAN,
Attorney for Defendant in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

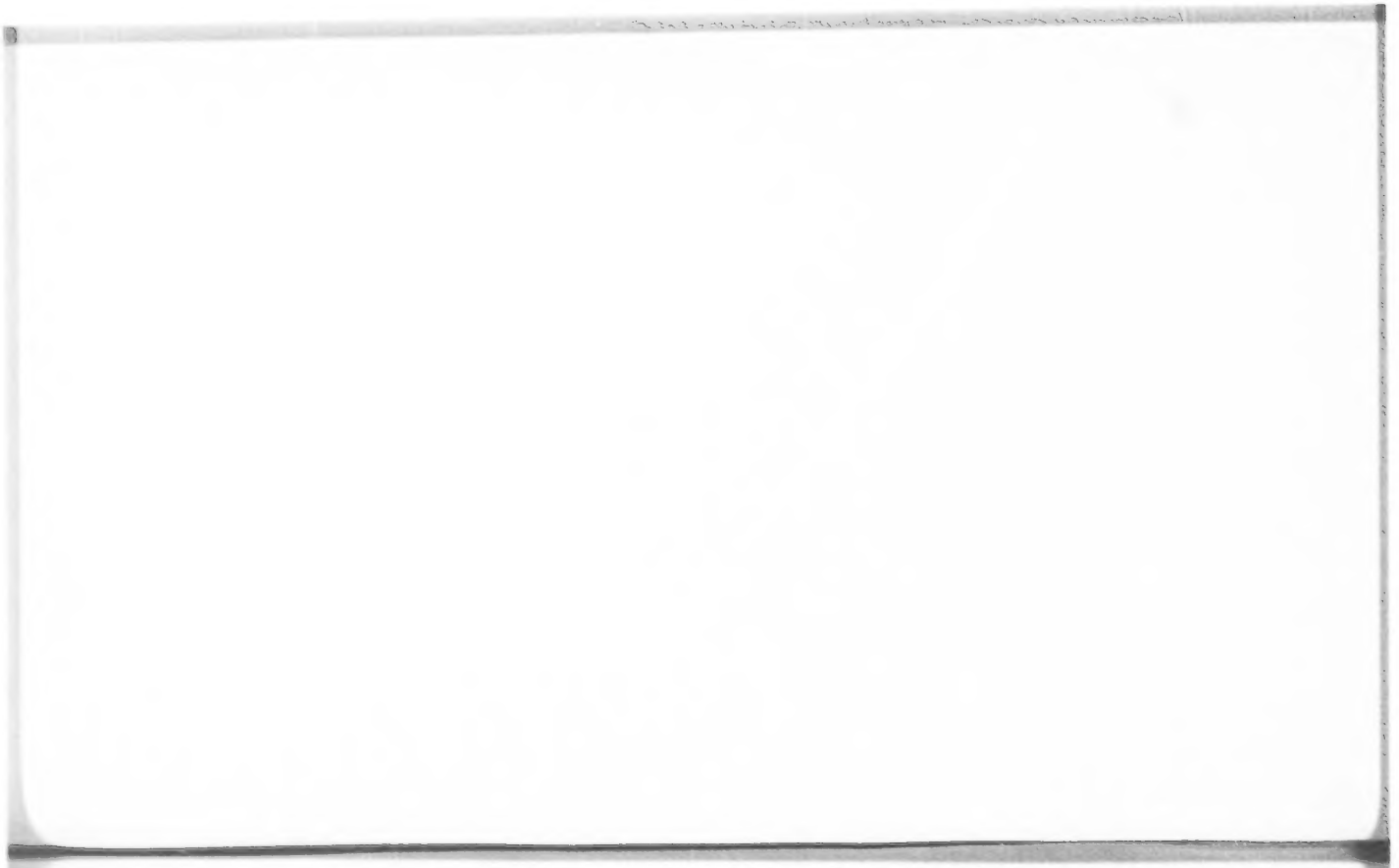
v.

THE HOME SAVINGS BANK, RESPONDENT.

MOTION.

COMES NOW the Board of County Commissioners of the City and County of Denver, by Charles S. Thomas, William H. Bryant, Milton Smith, William H. Ferguson, and Charles R. Brock, its counsel, and moves this honorable court that it shall by certiorari or other process, directed to the honorable judges of the United States Circuit Court of Appeals of the Eighth Circuit, require said court to certify to this court for review and determination a certain cause in said Court of Appeals lately pending, wherein the respondent was defendant in error and your petitioner was plaintiff in error, and to that end it now tenders herewith its petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Petitioner.



In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Board of County Commissioners of the City and County of Denver, respectfully represents:

That this action was brought in the Circuit Court of the United States for the District of Colorado by the respondent, The Home Savings Bank, a corporation organized under the laws of the State of Michigan, to recover from the petitioner, a corporation organized under the laws of the State of Colorado, upon a certificate of indebtedness in the principal sum of eleven thousand two hundred and fifty ($11,250.00) dollars, which said certificate of indebtedness is in words and figures as follows, to-wit:

"$11,250 No. 1

CERTIFICATE OF INDEBTEDNESS

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim for furnishing ballot machines against the city and county of Denver in the sum of eleven thousand two hundred and fifty dollars, and the same having been allowed at a regular meeting of the board of county commissioners of the city and county of Denver, state of Colorado, on the 17th day of February, 1908, and the board of county commissioners being authorized thereto by the laws of the state of Colorado, act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum from the date hereof at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons hereto attached. Interest and principal payable at the office of the county treasurer of the city and county of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the board of county commissioners of the city and county of Denver, state of Colorado, by its chairman, and attested by the county clerk and recorder, with

the seal of the county authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20, 1908.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,

By S. D. C. HAYS, Chairman.

Attest:

(Seal) ALBION K. VICKERY,
County Clerk and Recorder of the City and County of Denver, Colorado."

This certificate was endorsed by the Federal Ballot Machine Company to the respondent, The Home Savings Bank, and the jurisdiction of the Circuit Court was invoked upon the ground of diversity of citizenship.

In the complaint said certificate was characterized as negotiable, and it was alleged that the certificate was presented for payment; that payment was refused, and that it was thereupon protested for nonpayment, and that plaintiff paid protest fees in the amount of seven dollars and fifty cents.

The petitioner interposed a motion to strike from the complaint the word "negotiable," together with all allegations made with respect to the protest and protest fees, upon the ground that the word "negotiable" was but the expression of an erroneous legal conclusion, and that it appeared from the face of the complaint that the instrument sued on was not negotiable, and could not therefore be legally protested. This motion was denied.

Subsequently an amended answer, containing three defenses, was filed. The first defense placed certain material allegations of the complaint in issue. The second defense set up facts showing a failure of consideration, coupled with allegations showing that the plaintiff was not a holder of the certificate in due course. The third defense merely alleged facts which established an absolute failure of consideration.

A demurrer was interposed by the plaintiff to each of these defenses. It was overruled as to the first and second defenses, but sustained as to the third. To the action of the court in sustaining the demurrer to the third defense, the defendant saved no exception, and, of course, preserved no bill of exceptions in respect to the ruling of the court upon said demurrer. The third defense was sufficient in law, solely and only upon the theory that the certificate was not negotiable. As to whether the certificate was negotiable depended solely and exclusively upon the question of the power and authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness under the laws of the State of Colorado. If the law gave them the power to issue a negotiable certificate of indebtedness, the third defense was not sufficient in law. On the other hand, if, under the law, the Board of County Commissioners had no authority to issue a negotiable certificate of indebtedness, the third defense was sufficient in law. In other words, the third defense, and the demurrer thereto, raised definitely and certainly the same issue of law which petitioner previously sought to raise by a motion to strike the portions of the complaint above mentioned.

In sustaining the demurrer to the third defense, the trial court held that the Board of County Com-

missioners had authority to issue a negotiable certificate of indebtedness, and that the certificate in question was of that character.

The plaintiff filed a replication to the second defense, and a trial was had upon the issues of fact thus formed. The allegations of the complaint which the first defense put in issue were sufficiently established at the trial, and the evidence certainly conduced to establish that the plaintiff was a holder of the certificate of indebtedness in due course. A judgment was accordingly entered for the amount claimed by the complaint.

For the purpose of procuring a review of the action of the trial court in sustaining the demurrer to the third defense, a writ of error in due time was sued out from the United States Circuit Court of Appeals of the Eighth Circuit. Among the errors specifically assigned was the following:

> "The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and amended answer."

Other assignments of error were attempted to be directed to the same question.

The case was argued upon the assignment of error above set forth, in the Circuit Court of Appeals, on the 25th day of September, 1911, and taken under advisement.

On the 24th day of August, 1912, the judgment of the Circuit Court was affirmed by the Court of Appeals, as directed by an opinion which refused to consider or pass upon the sufficiency of the third defense

of the answer, for the sole and only reason that there had been no exception taken to the ruling of the trial court in sustaining the demurrer thereto. Believing that this ruling of the Circuit Court of appeals was purely the result of an inadvertence, a petition for a rehearing was promptly filed. Attention was called by said petition to the fact that the demurrer to the third defense raised an issue of law, which was apparent upon the face of the record; that the ruling of the court thereon was subject to review upon writ of error, without any exception having been taken, and without any bill of exceptions; and that to require an exception to such ruling was an innovation hitherto unknown to the federal courts, the hitherto prevailing practice in the Circuit Court of Appeals, and in direct conflict with numerous express decisions of the Supreme Court of the United States.

In support of the petition for rehearing, attention was also called to the fact that no rule of the Circuit Court of Appeals or of the United States Supreme Court has ever been established or promulgated requiring an exception to be taken to the ruling of the trial court upon a demurrer to a pleading, as a condition precedent to the right of the Circuit Court of Appeals or the Supreme Court of the United States to review such ruling upon writ of error; that no statute had been passed by the Congress of the United States upon the question; that the Supreme Court of the United States, and many of the inferior federal courts, had declared, in the absence of such act of Congress or rule of court, that we are remitted to the common law as our guide for the proper procedure, and that under the common-law rule it had

been the practice from time immemorial—indeed, from the earliest history of the writ of error, long antedating the statutory origin of a bill of exceptions—for appellate courts upon writ of error to review the ruling of the trial court upon a demurrer to a pleading, without an exception or bill of exceptions, for the reason that such ruling was apparent upon the face of the record.

It was thus shown that the exception, which can only become a part of the record through means of a bill of exceptions, is wholly foreign to those matters which constitute a part of the record proper, and in respect of which no change whatever has been wrought by statutes which have provided the means, through a bill of exceptions, of gathering up extraneous matter, and constituting it a part of the record.

On the 6th day of December, 1912, the petition for a rehearing was denied.

Your petitioner therefore believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and establishes a rule directly in conflict with that which otherwise uniformly prevails in the Circuit Courts of Appeals, and which has uniformly been announced by the Supreme Court of the United States; and this honorable court, in the interest of a uniform practice, upon a question possibly involved in every common-law action, and with respect to which there should be but one rule, should require the said case to be certified to it for its review and determination, in conformity with the provisions of the act of Congress in such cases made and provided.

Your petitioner has no right of appeal to or writ of error from this court, for the reason that the juris-

diction of the Circuit Court depended entirely on diverse citizenship.

Your petitioner presents herewith as a part of this petition a brief showing more fully its views upon the question involved, and a duly certified transcript of the record of the Circuit Court of Appeals, and also ten (10) printed copies of said record.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of all records of the Circuit Court of Appeals in this case, which is No. 3526 on the docket of said court, and which was entitled in that court, "*The Board of County Commissioners of the City and County of Denver,* Plaintiff in Error, v. *The Home Savings Bank,* Defendant in Error," to the end that said cause may be reviewed and determined by this court, as provided by law; and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem proper, and that the said judgment of the Circuit Court of Appeals may be reversed by this honorable court.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,

By CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Its Attorneys.

State of Colorado, City and County of Denver, ss.

CHARLES R. BROCK, being first duly sworn, upon oath says that he is one of the counsel for the Board of County Commissioners of the City and County of Denver, the petitioner; that he prepared the foregoing petition, and that the allegations therein are true, as he verily believes.

CHARLES R. BROCK.

Subscribed and sworn to before me this 18th day of February, A. D. 1913.

My commission expires November 13, 1915.

MAY STEWART,
Notary Public in and for the City and County of Denver, State of Colorado.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

WITHOUT THE AUTHORITY OF AN ACT OF CONGRESS, WITHOUT ANY RULE OF COURT TO THAT EFFECT, IN VIOLATION OF THE COMMON-LAW RULE WHICH HAS PREVAILED FROM THE EARLIEST HISTORY OF THE WRIT OF ERROR, IN VIOLATION OF THE HITHERTO UNIFORM PRACTICE OF THE CIRCUIT COURTS OF APPEALS OF THE UNITED STATES, AND IN VIOLATION OF THE RULE LONG AGO ANNOUNCED, REITERATED AND CONSISTENTLY FOLLOWED BY THE SUPREME COURT OF THE UNITED STATES, THE CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT IN THIS CASE HAS DECLARED

THAT, IN THE ABSENCE OF AN EXCEPTION, PROPERLY RESERVED, THE COURT OF APPEALS MAY NOT REVIEW THE RULING OF THE TRIAL COURT UPON A GENERAL DEMURRER TO A PLEADING.

As a result of the rule thus announced, the Court of Appeals declined to review the ruling of the lower court in sustaining a demurrer to the third defense of petitioner's answer.

It is primarily because of this ruling that the petition for a writ of certiorari has been presented. It is, of course, important to our client that the merits of its defense should be adjudicated. It is of infinitely greater importance that it shall not be possible, during the course of litigation, for a rule of procedure, which has prevailed for ages, and upon which members of the profession everywhere have relied, to be abrogated or ignored in such a way as to preclude adjudication upon a question presented and urged in conformity with what has hitherto been the uniform and prevailing practice.

At a time when the joint efforts of bench and bar are about to culminate in simplying and facilitating the preparation and trial of suits in equity, a decision has been made in this case which, if permitted to stand, will greatly complicate the prosecution of actions at law. Hitherto the profession has understood that exceptions are necessary to a review of those rulings of the court which do not constitute a part of the record proper. It has been understood that a bill of exceptions is the means of bringing into the record such rulings and the extraneous matters with respect to which the rulings complained of

were made. Every lawyer of fair experience appreciates this situation, and understands that following the conclusion of the trial a bill of exceptions must be prepared, incorporating those exceptions reserved in the course of the trial, as the basis for review by the appellate court. On the other hand, it has been equally understood that no exception is necessary, and, of course, no bill of exception proper, in respect of the rulings of the trial court upon matters which constitute a part of the record proper. The ruling now complained of has thrown the profession into a state of confusion and uncertainty. If it be true that an exception must be taken to a ruling upon a demurrer, in order to have that ruling reviewed upon writ of error, the question arises as to when such an exception must be preserved by bill of exceptions. To a pleading a demurrer is interposed, and sustained or overruled, at one term of court. The case is tried at the next term, or at some succeeding term. Must the exception, reserved to the ruling upon the demurrer, be preserved by bill of exceptions, prepared and signed within the term at which the ruling is made, or may the exception to the ruling upon the demurrer be incorporated in the general bill of exceptions prepared at the conclusion of the trial?

These are some of the questions confronting the profession, in view of the decision of which we complain. In addition, the burdens of the profession are increased, in that counsel must now reserve exceptions, where none was required before, and incorporate into a bill of exceptions matters which are already a part of the record, thus unnecessarily encumbering the record with a duplicate of precisely the same thing.

There is no court of appeals in the land which has to its credit a greater number of sound and lucid decisions upon the adjective law of the federal courts than has the United States Circuit Court of Appeals of the Eighth Circuit. When that court therefore fails to differentiate between matters constituting a part of the record proper and matters which become a part of the record only by means of a bill of exceptions, we apprehend that the resulting error will be charged to some omission or dereliction on the part of counsel of record in the cause. It is obvious, therefore, that our full duty will not be performed until we have made every possible effort to procure a correction of the error resulting from a failure of the court to discriminate between matters which are fundamentally different.

In support of this new doctrine the Court of Appeals has cited the following cases:

Railway Co. v. Heck, 102 U. S., 120.

Newport News etc. Ry. Co. v. Pace, 138 U. S., 36.

Potter v. United States, 122 Fed., 49.

Of these three cases, two of them involved assignments of error based upon alleged errors in the admission of testimony, but to which no exception had been taken. The other case involved an assignment of error based upon an alleged erroneous charge to the jury, but with respect to which no exception had been taken. All three of the cases thus dealt exclusively with matters which did not constitute a part of the record proper. They dealt with matters which could only become a part of the record by means

of a bill of exceptions. As to all such matters, it has been the rule from the time that a statutory provision for a bill of exceptions was first enacted, that an exception is necessary. Of course, where an exception is necessary, a bill of exceptions is also necessary. Otherwise the exception would not appear in the record.

Embraced within the rule just stated are exceptions to the admission or rejection of evidence, or with respect to charges made or refused to be made to a jury. Indeed, the rule embraces all of those matters which, in the ordinary course of a trial, result in an exception or objection. The same rule was long since announced with respect to motions. This is because motions, though sometimes reduced to writing, are in theory oral, and constitute no part of the pleadings proper.

It is, however, unnecessary to attempt to catalogue the different questions which may possibly arise in the course of litigation, affecting the substantial rights of the parties, and which do not appear upon the face of the record. In order to have any ruling upon such matters reviewed by the appellate court, it is necessary for an exception to the ruling to be reserved at the time, and subsequently duly incorporated into a bill of exceptions.

The theory upon which this rule proceeds is that, such matters being wholly without the record, and the ruling thereon being itself without the record, the ruling of the court will be deemed waived, unless by an exception the court is sharply and positively apprised of a purpose to incorporate the ruling into a bill of exceptions, and by this means to make it a

part of the record, and thus render the ruling a subject of review by a higher court.

Webb v. National Bank of Republic of Chicago, 146 Fed., 717.

It will be noted, as above suggested, that the exception and the bill of exceptions necessarily go hand in hand. The former would avail nothing without the latter. The office of the bill of exceptions is to preserve the exception and bring it into the record. No exception ever became a part of the record otherwise than by means of a bill of exceptions. If an exception is necessary, it results that a bill of exceptions is also necessary. It is absurd to speak of the former in connection with the writ of error, apart from the latter. But for the latter, the appellate court could not know that the former ever existed.

As said by Mr. Justice Gray, in Hanna v. Maas, 122 U. S., 24:

> "The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains."

The pleadings, including demurrers and rulings thereon, from time immemorial have constituted a part of the record proper. Any error committed by the

trial court in ruling upon a demurrer to a pleading is and always has been apparent on the record, and consequently subject to review upon writ of error.

There is no act of Congress upon the question under consideration, nor is there any written rule of court thereon. This court, as well as the inferior federal courts, has uniformly held that the practice pertaining to the prosecution of writs of error in the federal court, and the steps to be taken in order to have a federal appellate court review any action of the trial court, are not controlled by the state practice, nor are they comprehended within that statute of the United States adopting, as far as may be, the practice of the state courts in the trial of common-law actions in the federal courts.

Chateaugay Ore & Iron Co., Petitioner, 128 U. S., 544.

Knight v. Illinois Central R. Co., 180 Fed., 368.

Ghost v. United States, 168 Fed., 841.

Francisco v. Chicago & A. R. Co., 149 Fed., 354.

City of Manning v. German Insurance Co., 107 Fed., 52.

Tullis v. Lake Erie & W. R. Co., 105 Fed., 554.

Consumers Cotton Oil Co. v. Ashburn, 81 Fed., 331.

Lowry v. Mt. Adams & Eden Incline etc. R. Co., 68 Fed., 627.

Preble v. Bates, 40 Fed., 745.

Doty v. Jewett, 19 Fed., 337.

These cases conclusively establish that, in the absence of an act of Congress or rule of court on the subject, the practice of the federal appellate courts is derived solely and exclusively from the common law and ancient English statutes.

Section 953 of the Revised Statutes of the United States regulates in some measure the authentication of the bill of exceptions, but does not purport to change the common-law rule as to what constitutes a part of the record proper, or as to what becomes a part of the record only through the aid of a bill of exceptions. Rule 4 of this court and Rule 10 of the United States Circuit Court of Appeals impose certain restrictions in respect to the matters to be incorporated into a bill of exceptions; but neither of these rules even remotely suggest that there shall be incorporated into a bill of exceptions any matter which already constitutes a part of the record. The necessary inference from the language used is absolutely to the contrary.

It results, therefore, that both the statutes of the United States and the written rules of the federal appellate courts are silent, as they have always been, upon the question under consideration. Many rules exist, however, without having been reduced to written form. Hopkins, in his New Federal Equity Rules, at page 10, says:

> "Rules of court may be defined to be the standing regulations of its practice, which have been adopted by the court itself, or prescribed for it by higher judicial or leg-

> islative authority. They may not be written; indeed, there is much unwritten practice known to every court. 'It is not necessary,' said Mr. Justice Blatchford, when district judge, 'that a practice of a court to be recognized or sustained should be embodied in a written rule. Written rules are undoubtedly preferable, but a practice in respect to a particular matter in a court may be established without the existence of a positive written rule.' "

It results that the federal courts have ever been remitted to the common law for guidance as to what matters were subject to review upon writs of error without a bill of exceptions.

It remains to be shown that an unwritten rule of this court—binding, we respectfully submit, upon all of the federal appellate courts—long ago declared that the ruling of the trial court, in sustaining or overruling a demurrer to a pleading, is subject to review upon error in this court, without a bill of exceptions. This rule is embodied in numerous positive decisions of this court. After citing some of these authorities, we shall show that the rule so announced absolutely conforms to that rule which prevailed at common law, both before and subsequent to the first English statute which provided for a bill of exceptions.

In Rogers v. City of Burlington, 3 Wallace, 654, it appears that to the ruling upon demurrers, exceptions were interposed, and preserved by bill of exceptions. The court held this to be useless and unnecessary, using the following language:

"Plaintiff excepted to both those rulings and a bill of exceptions to that effect, in due form, is exhibited in the record; but it is unnecessary further to advert to it, as it is well settled that the ruling of the circuit court, in sustaining or overruling a demurrer to a declaration, and rendering judgment for the wrong party, may be re-examined in this court by a writ of error without any formal bill of exceptions. Gorman v. Lenox, 15 Pet. 115; Suydam v. Williamson, 20 How. 436. Reason for the rule is, that the error is apparent on the record; and it is generally true that where the error is apparent on the face of the record a bill of exceptions is unnecessary."

In City of Aurora v. West, 7 Wallace, 82, the court used the following language:

"Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below in overruling the demurrer of the defendants to the tenth replication of the plaintiffs, and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth and eighth replications of the plaintiffs. Such being the state of the case, the decision of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends."

In Suydam v. Williamson, 20 How., 427, the court discusses the method of making exhibits a part of the record, and then declares:

> "The effect of the proceeding in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error. 1 Chit. on Plead., 10th Am. ed., 431; 1 Tidd's Prac., 3d Am. ed., 586. And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends; and so it must have been understood by this court in Gorman v. Lennox, 15 Pet. 115, where it was held, in accordance with the principle here advanced, that the action of the circuit court of this district, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and

> when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict."

In Clune v. United States, 159 U. S., 590, Mr. Justice Brewer, speaking for the court, said:

> "An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, process, the verdict and the judgment, and such other matters as by some statutory or recognized method have been made a part of it."

These decisions are declaratory of the common law. At common law, the ruling of the court upon a demurrer to a pleading has always been a proper subject of review upon error by the appellate court. This was true before a bill of exceptions was known. It was true when the higher court had no power to consider upon writ of error anything at all except those matters which appeared upon the face of the record. Prior to the enactment of the first statute providing for a bill of exceptions, the only court which had the power to consider any external question of *fact* was the trial court itself. This was by writ of error *coram nobis* or *coram vobis*.

> Pickett's Heirs v. Legerwood, 7 Pet., 144.
>
> Stephen on Pleading, Tyler's edition, p. 142.

In other words, if any question of *fact* was to be considered upon a writ of error, that could only be

done under the writ of error *coram nobis*. This writ of error, like the writ of error proper, was sued out of chancery, commanding the judges of the trial court themselves to examine the record, and this the trial court had the power to do, in the light of the external facts which were produced in connection with such review. The end accomplished by the writ of error *coram nobis*, anciently, has been accomplished in modern times by a motion, supported by affidavits. The writ of error proper, however, though issued in the same way, commanded the judges to send the record to the court of appellate jurisdiction, and the appellate court was able to review every question of law which appeared on the face of the record, but was unable to consider any question of fact whatever.

This condition continued until the time of the reign of Edward I. In his reign the statute of Westminster 2, 13 Edw. I., c. 31, was enacted, and thereby provision was made for questions of fact and the rulings of the court thereon, which were presented and made in the course of the trial, to be incorporated into a bill of exceptions. This bill of exceptions the trial judge was required to seal. Thus the facts and decisions thereon, which were embraced within the bill of exceptions, were made to become a part of the record, and the rulings set forth therein became subject to review upon writ of error by the appellate court, just as it had always reviewed the questions of law arising upon the face of the record.

The bill of exceptions, therefore, in its origin and purpose, when properly prepared, embraced matters which were exclusively *dehors* the record. It in no respect changed the law as to what was already in the

record. With such matters the bill of exceptions had no connection whatever. Those matters, prior to the statute of Westminster, had always been subject to review upon writ of error. They continued to be subject to review in the same way. The single and sole purpose of the bill of exceptions was to put extraneous matters presented or occurring at the trial upon the record, in order that issues of law arising thereon might also be considered by the appellate court.

In Coke upon Littleton, Volume 1, in a note to section 155 b, it is said:

> "And, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster 2, c. 31, make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it."

Stephen on Pleading, Tyler's edition, at page 142, says:

> "When a writ of error is obtained, the whole proceedings to final judgment inclusive, are then always actually *entered* (if this has not before been done) on record, and the object of the writ of error is to reverse the judgment for some *error of fact or law* that is supposed to exist in the proceedings *as so recorded.*"

The author then proceeds to show that if it be an error of fact, the review can only be had by the writ of error *coram nobis*, and continues:

"But the most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake *in law*. This may be by having *wrongly decided an issue in law* brought before them by demurrer, but it may also happen in other ways. As formerly stated, the judgment will in general follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, to *examine the whole record*, and then to adjudge either for the plaintiff or defendant, according to the legal right as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties; and this, because the pleader may, from misapprehension, have passed by a material question of law without taking issue upon it. Therefore, whenever, *upon examination of the whole record*, right appears on the whole not to have been done, and *judgment appears to have been given for one of the parties, when it should have been given for the other*, this will be an *error in law*. And it will be equally error, whether the question was raised on *demurrer*. * * * But * * * nothing will be error in law that does not appear *on the face of the record;* for matters not so appearing are not

supposed to have entered into the consideration of the judges. Upon error in *law*, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment), but by a writ of error, requiring the record to be sent into some other court of appellate jurisdiction, that the error may be there corrected, and called a writ of error generally."

Blackstone, in his Commentaries, Volume 3; at page 372, gives the following account and purpose of the above-mentioned statute:

"The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a *bill of exceptions;* stating the point wherein he is

supposed to err: and this he is obliged to seal by statute Westm. 2, 13 Edw. I, c. 31, or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below."

In Encyclopaedia of Pleading and Practice, Volume 3, at page 378, it is said:

"Prior to the statute of Westminster (13 Ed. I, c. 31), the only errors reviewable at common law on a writ of error were those apparent on the face of the record proper. The record proper consisted of the pleadings, process, verdict and judgment. Exceptions to rulings of the court during the progress of the trial were not brought up, as the oral or parol matters on which they were based were not incorporated in the record. The bill of exceptions being, accordingly, purely a creation of statute and unknown to the common law, it cannot be extended to cases not within the contemplation of the statute. The statute of Westminster was applicable only to civil cases sued in courts following the common law."

At page 404 of the same volume it is said:

> "It is a general rule of appellate procedure that a bill of exceptions is useless, and indeed none should be brought up to the appellate court, where all the facts constituting the alleged error appear on the face of the record proper. The reason for this rule is obvious, since the only purpose of the bill is to bring before the court in an authenticated manner facts which in the ordinary course of proceeding would not otherwise appear of record in the case."

We ask permission to cite from the Supreme Court of Florida an interesting discussion of the question, in the case of Barnes v. Scott, 11 Southern Reporter, page 48, where the court says:

> "While the rule is well settled that exceptions must be taken and noted to all rulings of the court below that it is desired to have reviewed here, when such rulings are made during the progress of a trial concerning matters *in pais*, that are not and can never be a part of the record in the case, unless made so by bill of exceptions duly made up and authenticated by the signature and seal of the judge presiding, yet this rule, upon a writ of error, does not apply to rulings that are apparent upon the face of the record, and that are, per force of their very nature, a part of the record itself, and that appear from a simple transcript of the papers and proceedings that compose the record proper

of the cause, without the help or addition of a bill of exceptions—such, for instance, as the rulings of the court upon demurrers to the different pleadings. When the matter submitted to the court for its decision, and the ruling thereon, is made to appear as a part of the legitimate record proceedings in the cause, leading up as steps to the formation of the issues therein, then as to such matters there is no necessity for any exception in order to have it reviewed here, because in such cases a bare transcript of the papers filed in the cause, and that compose within themselves that which is the record of such cause, and the rulings of the court thereon, would upon their face exhibit the matter to be reviewed here without the aid of a bill of exceptions to make it appear. The distinction as to when it is and when it is not necessary to take or note exceptions to rulings upon which a review is desired, is thus very clearly put in Pow. App. Proc., p. 215:

"The only object of a bill of exceptions is to bring into the record the facts and the decision of the court, where it would not otherwise appear therein. Sometimes, when a matter transpires or a decision is casually made, and its objectionable character not readily perceived, the party is required to make his objection at the time in order to enable the matter to be corrected, if it is chosen to be, for otherwise it may be presumed that the matter was assented to or

> waived. But where a question is directly raised to the court to respond to it, as upon a demurrer, * * * no bill of exceptions is necessary.' "

We again wish to emphasize the fact that an exception is not to be separated from a bill of exceptions. If the former is necessary, the latter affords the only means of preserving it. It is true that a practice prevails in some states, as we are advised—as, for example, in Kentucky and probably in Wyoming—of appending to a judgment a form of exception; but this is a practice wholly unknown to the common law, and which is of no importance here, except as it may serve to illustrate the danger of the federal courts falling into errors by inadvertently adopting the state practice.

It seems to us that no argument is necessary to show that the practice on the question under discussion should be uniform in all of the courts of the United States. The rule adopted by the Supreme Court should prevail in all of the other federal appellate courts.

Hopkins, in his New Federal Equity Rules, at page 11, well said:

> "The primary object of all rules is to secure uniformity in practice. They relate to the adjective, not to the substantive, law. * * * Every lawyer wishes to comply with the rules of court. The difficulty of learning what the rules, written and unwritten, are, consumes much valuable time, which

> were better devoted to the merits of the controversies in the courts. * * * When the rule is clear, and courts deliberately depart from it, the result is an unfair embarrassment of the bar."

We assume that every conscientious member of the bar stands in more or less dread of the possibility of some omission on his part resulting in the refusal of the court to pass upon the merits of his client's cause of action or defense. No lawyer is held blameless who fails to follow that procedure prescribed by the court, and made a condition precedent to the right to adjudicate the real issues of the controversy. We yield to no one in the sense of responsibility attaching to a lawyer in this respect. In an effort to know the proper practice and procedure upon the question under discussion, we have spared no pains. We have examined into every known source of information on the subject—the statutes of the United States, the rules of this court and of the Court of Appeals, the common law, the decisions of this court, the practice in the Courts of Appeals, and finally the history, including the origin and office, of the bill of exceptions. A careful investigation of these subjects can lead to but one conclusion, and that conclusion this court reached long before the Courts of Appeals were established, and that conclusion became a recognized, though unwritten, rule of procedure in all of the federal courts, without a single exception, so far as we have been able to discover, until the decision in this case.

With respect to a rule of practice which has prevailed from time immemorial, changes may become

necessary. As respects the rule under consideration, we respectfully submit, however, that no reason, based upon principle, convenience, or necessity, can be given for its abrogation. In any event, if a rule of such long duration and uniform recognition is to be abrogated, the new rule, whether made by statute, written or unwritten rule of court, should never be permitted to become retroactive in its operation. The adjective law, no less than the substantive law, if changed during the course of litigation, and made retroactive with respect thereto, proves disastrous to the rights of the litigant, and violates the spirit, if not the letter, of the Constitution of the United States. We urge, however, that there is no reason why any change should be made in the rule under discussion, and we express the hope that the additional burdens necessarily incident to such change, in preparation for reviews upon writs of error, will not be unnecessarily imposed upon the profession.

In the interest of harmony in the practice and procedure in the federal courts, we respectfully urge that the writ of certiorari in this case may be granted, and the rule once more announced by this tribunal in conformity with its previous declarations upon this important subject.

Respectfully submitted,

CHARLES S. THOMAS,
WILLIAM H. BRYANT,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Petitioner.

No. ~~480.~~ 126

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

~~No. 1910.~~

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

BRIEF FOR PETITIONER.

I. N. STEVENS,
MILTON SMITH,
WILLIAM H. FERGUSON,
CHARLES R. BROCK,
Attorneys for Petitioner.

Smith-Brooks [redacted] Press, Denver.

CONTENTS OF BRIEF

CASES CITED

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1912.

No. 1010.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER, PETITIONER,

v.

THE HOME SAVINGS BANK, RESPONDENT.

BRIEF FOR PETITIONER.

STATEMENT.

This action was brought in the Circuit Court of the United States for the District of Colorado by the respondent, The Home Savings Bank, a corporation organized under the laws of the State of Michigan, to recover from the petitioner, a municipal corporation organized under the laws of the State of Colorado, upon a certificate of indebtedness in the principal sum of $11,250. The certificate of indebtedness

is set out *in haec verba* in the complaint, and is as follows:

"$11,250 No. 1

CERTIFICATE OF INDEBTEDNESS

City and County of Denver, State of Colorado.

The Federal Ballot Machine Company having presented its claim for furnishing ballot machines against the city and county of Denver in the sum of eleven thousand two hundred and fifty dollars, and the same having been allowed at a regular meeting of the board of county commissioners of the city and county of Denver, state of Colorado, on the 17th day of February, 1908, and the board of county commissioners being authorized thereto by the laws of the state of Colorado, act of 1905, hereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum from the date hereof at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons hereto attached. Interest and principal payable at the office of the county treasurer of the city and county of Denver, Colorado. This certificate is one of a series of ten issued in like sum, payable annually.

Signed by the board of county commissioners of the city and county of Denver, state of Colorado, by its chairman, and attested by the county clerk and recorder, with the seal of the county authorized thereto by resolution of the 20th day of February, 1908.

Denver, Colorado, February 20, 1908.

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,

By S. D. C. HAYS, Chairman.

Attest:

(Seal) ALBION K. VICKERY,
County Clerk and Recorder
of the City and County of
Denver, Colorado."

A second cause of action was for the recovery of the amount alleged to be due upon one of the interest coupons mentioned in said certificate.

To the complaint an amended answer was filed, containing three separate defenses. The first and second defenses raised questions of fact, which were decided adversely to the plaintiff in the trial court, with the result that the third defense alone is material to the question here to be considered.

The third defense will be found, beginning at page 17 of the Record, and is as follows:

"For a third defense the defendant alleges, that the consideration for the execution of both the certificate of indebtedness

and interest coupon in the complaint mentioned, has wholly failed. That said instruments were executed in part payment for one hundred and fifty voting machines known as the Dean Ballot Machines, under an agreement made and entered into between the Federal Ballot Machine Company and this defendant on the 27th day of May A. D. 1907. That by said agreement the said Federal Ballot Machine Company undertook and guaranteed that each of said machines should conform in every particular to the constitution and statutes of the state of Colorado with respect to the holding of elections by means of said machines, and that they would perfectly and accurately perform the work of voting machines, as required by said laws. That the said machines do not conform in every particular to the requirements of the constitution and statutes of the state of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by said constitution and laws, in that in the use of said machines the secrecy of the ballot cannot be preserved; that the mechanism of the said machines is so intricate and complicated that an elector cannot vote at all within the limit of one minute; that it is impossible for an elector by the use of the said machine to vote a straight ticket, mixed ticket, or an irregular ticket, or any of them, within said space of time, and it is utterly impossible for an elector, by the use

of the said machines secretly to vote a split or irregular ticket; that said machines are so constructed that after they have been locked, preparatory for use at an election, they are easily and readily manipulated in such a way as to render possible the placing of fradulent ballots therein; that their construction is such that an elector cannot cast a vote for presidential electors without first divulging the names of the persons for whom he so desires to vote, and the construction of said machines is such that it is impossible for an elector to vote for any particular individual presidential elector; that by the use of said machines it is impossible, where there are as many as seven tickets, for an elector to vote for an independent candidate, and it is also impossible by the use of said machines to vote a straight ticket by a single device. The machines do not prevent a voter from voting for a candidiate or on a question for whom or on which he is not entitled to vote. Said machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote; that said machines are so constructed that if used at an election said ballots cannot be re-counted in case of contest in manner and form required and contemplated by law, and are without any value whatever."

To this third defense, as well as to the first and second defenses, the respondent interposed a general demurrer upon the ground that neither thereof stated

facts sufficient to constitute a defense to the cause of action set forth in the complaint. This demurrer was overruled as to the first and second defenses, but sustained as to the third.

To the action of the court in sustaining the demurrer to the third defense the defendants saved no exception, and consequently preserved no bill of exceptions in respect to the ruling of the court upon said demurrer. The third defense was sufficient in law solely and only upon the theory that the certificate of indebtedness sued upon was not negotiable. Whether the certificate was negotiable depended solely and exclusively upon the question of the power and authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness under the laws of the State of Colorado. If the law gave said board the power to issue a negotiable certificate of indebtedness, the third defense was not sufficient in law. On the other hand, if, under the law, the Board of County Commissioners had no authority to issue a negotiable certificate of indebtedness, the third defense was sufficient in law. This question was directly and unequivocally raised by the third defense and the demurrer thereto. In sustaining the demurrer to the third defense, the trial court of necessity held that the Board of County Commissioners had authority to issue a negotiable certificate of indebtedness, and that the certificate of indebtedness was in fact of that character.

The plaintiff filed a replication to the second defense, and a trial was had upon the issues of fact thus formed, as well as upon the issue of fact raised by the first defense to the complaint.

The allegations of the complaint which the first defense put in issue were sufficiently established at the trial, and the evidence certainly conduced to establish that the plaintiff was a holder of the certificate of indebtedness in due course. Judgment was accordingly entered for the amount claimed in the complaint.

For the purpose of procuring a review of the action of the trial court in sustaining the demurrer to the third defense, a writ of error in due time was sued out from the United States Circuit Court of Appeals for the Eighth Circuit. Among the errors specifically assigned were the following:

> "4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.
>
> 5. The court erred in ruling that the instruments sued on in the complaint were negotiable.
>
> 10. That the judgment is contrary to law."

The case was argued in the Circuit Court of Appeals on the 25th day of September, 1911, and taken under advisement. On the 24th day of August, 1912, the judgment of the Circuit Court was affirmed by the Court of Appeals, as directed by an opinion which refused to consider or pass upon the sufficiency of the third defense of the answer, for the sole and only reason that there had been no exception taken to the ruling of the trial court in sustaining the demurrer thereto. Subsequently, and within due time,

a petition for a rehearing was filed with the Circuit Court of Appeals, and this petition was denied on the 6th day of December, 1912. Thereupon application was made to this court for a writ of *certiorari*, and the writ was granted on March 24, 1913.

SPECIFICATION OF ERRORS.

The assignments of error made in the Court of Appeals, pages 69 and 70 of the Record, which will be urged here, are the following:

> "4. The court erred in sustaining the demurrers of the plaintiff to the third defense contained in both the original and the amended answer.
>
> 5. The court erred in ruling that the instruments sued on in the complaint were negotiable.
>
> 10. That the judgment is contrary to law."

ARGUMENT.

FIRST POINT.

AN EXCEPTION TO THE RULING OF THE TRIAL COURT UPON A DEMURRER TO A PLEADING IS NOT A CONDITION PRECEDENT TO THE RIGHT TO HAVE THAT RULING REVIEWED UPON WRIT OF ERROR, AND SUCH AN EXCEPTION IS UNAUTHORIZED BY ANY RULE WHICH HAS EVER BEEN KNOWN OR RECOGNIZED EITHER AT COMMON LAW OR IN THE FEDERAL COURTS OF THE UNITED STATES.

The merits of this controversy will be discussed under the *Second, Third,* and *Fourth Points.* A question of practice having been so ruled by the Circuit Court of Appeals as to prevent a consideration of the merits of petitioner's third defense, and that question of practice being the sole matter to which attention was directed in the application for a writ of *certiorari* from this court, we assume that it is proper for us *in limine* to address ourselves to that question of practice. Accordingly we present it as the first point of our argument.

In the opinion of the Circuit Court of Appeals, at page 85 of the Record, the following language is used:

> "The authority of defendant's board of commissioners, under the law of Colorado, to issue negotiable certificates of indebted-

ness, or the validity in its inception of the instrument sued upon, was challenged in the circuit court, if at all, only by demurrer to the third defense of the answer. The demurrer to that defense was sustained, upon what ground does not appear, but no exception was saved to the ruling. Admitting, without deciding, that the third defense raised the issue of the want of authority of the board of commissioners to issue the certificate as a negotiable instrument, or the legality of the instrument in its inception, the defendant, if it desired to test the correctness of the ruling sustaining the demurrer, should have excepted thereto at the time. This it did not do."

As a result of the rule thus announced, the Court of Appeals declined to review the ruling of the lower court in sustaining the demurrer to the third defense of petitioner's answer.

We shall easily be able to show that in this ruling an innovation has been created with respect to a question of practice that has been without exception in the entire history of the common law, and which has been equally uniform in all of the courts of the United States.

It is, of course, important to our client that the merits of its defense should be adjudicated. It is of infinitely greater importance that it shall not be possible, during the course of litigation, for a rule of procedure, which has prevailed for ages, and upon which members of the profession everywhere have

relied, to be abrogated or ignored in such a way as to preclude adjudication upon a question presented and urged in conformity with what has hitherto been the uniform and prevailing practice. At a time when the joint efforts of bench and bar have culminated in simplifying and facilitating the preparation and trial of suits in equity, a decision has been made in this case which, if permitted to stand, will greatly complicate the prosecution of actions at law. Hitherto the profession has understood that exceptions are necessary to a review of those rulings of the court which do not constitute a part of the record proper. It has been understood that a bill of exceptions is the means of bringing into the record such rulings and the extraneous matters with respect to which the rulings complained of were made. Every lawyer of fair experience appreciates this situation, and understands that, following the conclusion of the trial, a bill of exceptions must be prepared, incorporating those exceptions reserved in the course of the trial, as the basis for review by the appellate court. On the other hand, it has been equally understood that no exception is necessary, and, of course, no bill of exceptions proper, in respect of the rulings of the trial court upon matters which constitute a part of the record proper. The ruling now complained of, of necessity throws the profession into a state of confusion and uncertainty. If it be true that an exception must be taken to a ruling upon a demurrer in order to have that ruling reviewed upon writ of error, the question arises as to when such an exception must be preserved by bill of exceptions. To a pleading a demurrer is interposed, and sustained or overruled,

at one term of court. The case may be tried at the next term or at some succeeding term. Must the exception, reserved to the ruling upon the demurrer, be preserved by bill of exceptions, prepared and signed within the term at which the ruling is made, or may the exception to the ruling upon the demurrer be incorporated into the general bill of exceptions prepared at the conclusion of the trial?

These are some of the questions confronting the profession in view of the decision of which we complain. In addition, the burdens of the profession are increased in that counsel must reserve exceptions where none was required before, and incorporate into a bill of exceptions matters which are already a part of the record, thus unnecessarily encumbering the record with a duplicate of precisely the same thing.

There is no court of appeals in the land which has to its credit a greater number of sound and lucid decisions upon the adjective law of the federal courts than has the United States Circuit Court of Appeals of the Eighth Circuit. This is a matter of frequent comment on the part of members of the profession. When that court, therefore, fails to differentiate between matters constituting a part of the record proper and matters which become a part of the record only by means of a bill of exceptions, we apprehend that the resulting error will be charged to some omission or dereliction on the part of counsel of record in the cause. It is obvious, therefore, that our full duty will not be performed, either to our client or to the profession at large, until we have made every possible effort to procure a correction of the error resulting from the failure of the court, through inadvertence

or otherwise, to discriminate between matters which are fundamentally different.

In support of this new doctrine the Court of Appeals has cited the following cases:

Railway Co. v. Heck, 102 U. S., 120.

Newport News etc. Ry. Co. v. Pace, 158 U. S., 36.

Potter v. United States, 122 Fed., 49.

Of these three cases, two of them involved assignments of error based upon alleged errors in the admission of testimony, but to which no exception had been taken. The other case involved an assignment of error based upon an alleged erroneous charge to the jury, but with respect to which no exception had been taken. All three of the cases thus dealt exclusively with matters which did not constitute a part of the record proper; they dealt with matters which could only become a part of the record by means of a bill of exceptions. As to all such matters, it has been the rule, from the time that a statutory provision for a bill of exceptions was first enacted, that an exception is necessary. Of course, where an exception is necessary, a bill of exceptions is also necessary—otherwise the exception would not appear in the record.

Embraced within the rule just stated are exceptions to the admission or rejection of evidence, or with respect to charges made or refused to be made to a jury. Indeed, the rule embraces all those matters which in the ordinary course of a trial result in an exception or objection. The same rule was long since announced with respect to motions. This is because motions, though sometimes reduced to writing, are in

theory oral, constitute no part of the pleadings proper, and, therefore, no part of the record.

It is, however, unnecessary, to attempt to catalogue the different questions which may possibly arise in the course of litigation, affecting the substantial rights of the parties, and which do not appear upon the face of the record. In order to have any ruling upon such matters reviewed by the appellate court, it is necessary for an exception to the ruling to be reserved at the time, and subsequently duly incorporated into a bill of exceptions. The theory upon which this rule proceeds is that, such matters being wholly without the record, and the ruling thereon being itself without the record, the ruling of the court will be deemed waived, unless by an exception the court is sharply and positively apprised of a purpose to incorporate the ruling into a bill of exceptions, and by this means to make it a part of the record, and thus render the ruling a subject of review by a higher court.

Webb v. National Bank of Republic of Chicago, 146 Fed., 717.

It will be noted, as above suggested, that the exception and the bill of exceptions necessarily go hand in hand. The former would avail nothing without the latter. The office of the bill of exceptions is to preserve the exception, and to bring it into the record. No exception ever became a part of the record otherwise than by means of the bill of exceptions. If an exception is necessary, it results that a bill of exceptions is also necessary. It is absurd to speak of the former, in connection with the writ of

error, apart from the latter. But for the latter, the appellate court could not know that the former existed.

As said by Mr. Justice Gray in Hanna v. Maas, 122 U. S., 24:

> "The object of a bill of exceptions is to put on record rulings and instructions in matter of law which could not otherwise be a subject of revision in a court of error. The excepting party, in order to entitle himself to such revision, must not only allege exceptions at the trial or hearing, but he must afterwards draw up and hand to the presiding judge those exceptions in writing, stating distinctly and specifically the rulings or instructions of which he complains."

The pleadings, including demurrers and rulings thereon, from time immemorial have constituted a part of the record proper. Any error committed by the trial court in ruling upon a demurrer to a pleading is, and always has been, apparent on the record, and consequently subject to review upon writ of error. There is no act of Congress upon the question under consideration, nor is there any written rule of court thereon. This court, as well as the inferior federal courts, has uniformly held that the practice pertaining to the prosecution of writs of error in the federal court, and the steps to be taken in order to have a federal appellate court review any action of the trial court, are not controlled by the state practice, nor are they comprehended within that statute of the United States adopting, as far as may be, the practice of the

state courts in the trial of common-law actions in the federal courts.

Chateaugay Ore & Iron Co., Petitioner, 128 U. S., 544.

Knight v. Illinois Central R. Co., 180 Fed., 368.

Ghost v. United States, 168 Fed., 841.

Francisco v. Chicago & A. R. Co., 149 Fed., 354.

City of Manning v. German Insurance Co., 107 Fed., 52.

Tullis v. Lake Erie & W. R. Co., 105 Fed., 554.

Consumers Cotton Oil Co. v. Ashburn, 81 Fed., 331.

Lowry v. Mt. Adams & Eden Incline etc. R. Co., 68 Fed., 827.

Preble v. Bates, 40 Fed., 745.

Doty v. Jewett, 19 Fed., 337.

These cases conclusively establish that, in the absence of an act of Congress or rule of court on the subject, the practice of the federal appellate courts is derived solely and exclusively from the common law and ancient English statutes.

Section 953 of the Revised Statutes of the United States regulates in some measure the authentication of the bill of exceptions, but does not purport to change the common-law rule as to what constitutes a part of the record proper, or as to what becomes a part of the record proper only through the aid of a bill of exceptions. Rule 4 of this court and Rule 10 of the

United States Circuit Court of Appeals impose certain restrictions in respect to matters to be incorporated into the bill of exceptions, but neither of these rules even remotely suggests that there shall be incorporated into a bill of exceptions any matter which already constitutes a part of the record. The necessary inference from the language used is absolutely to the contrary. It results, therefore, that both the statutes of the United States and the written rules of the federal appellate courts are silent, as they have always been, upon the question under consideration. Many rules exist, however, without having been reduced to written form. Hopkins, in his New Equity Rules, at page 10, says:

> "Rules of court may be defined to be the standing regulations of its practice, which have been adopted by the court itself, or prescribed for it by higher judicial or legislative authority. They may not be written; indeed, there is much unwritten practice known to every court. 'It is not necessary,' said Mr. Justice Blatchford, when district judge, 'that a practice of a court to be recognized or sustained should be embodied in a written rule. Written rules are undoubtedly preferable, but a practice in respect to a particular matter in a court may be established without the existence of a positive written rule.'"

It results that the federal courts have ever been remitted to the common law for guidance as to what matters were subject to review upon writs of error

without a bill of exceptions. It remains for us to show that an unwritten rule of this court—binding, we respectfully submit, upon all of the federal appellate courts—long ago declared that the ruling of the trial court in sustaining or overruling a demurrer to a pleading is subject to review upon error in this court, without a bill of exceptions. This rule is embodied in numerous positive decisions. After citing some of these authorities, we shall show that the rule so announced absolutely conforms to that rule which prevailed at common law, both subsequent to and before the first English statute which provided for a bill of exceptions.

In Rogers v. City of Burlington, 3 Wallace, 654, it appears that to the ruling upon demurrers exceptions were interposed, and preserved by bill of exceptions. The court held this to be useless and unnecessary, using the following language:

> "Plaintiff excepted to both those rulings and a bill of exceptions to that effect, in due form, is exhibited in the record; but it is unnecessary further to advert to it, as it is well settled that the ruling of the circuit court, in sustaining or overruling a demurrer to a declaration, and rendering judgment for the wrong party, may be re-examined in this court by a writ of error without any formal bill of exceptions. Gorman v. Lenox, 15 Pet. 115; Suydam v. Williamson, 20 How. 436. Reason for the rule is, that the error is apparent on the face of the record; and it is generally true that where the error is ap-

parent on the face of the record a bill of exceptions is unnecessary."

In City of Aurora v. West, 7 Wallace, 82, the court used the following language:

> "Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below in overruling the demurrer of the defendants to the tenth replication of the plaintiffs, and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth and eighth replications of the plaintiffs. Such being the state of the case, the decision of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon demurrers to material pleadings on which the cause depends."

In Suydam v. Williamson, 20 How., 427, the court discusses the method of making exhibits a part of the record, and then declares:

> "The effect of the proceeding in certain cases, is to make the instrument a part of the pleadings, and, consequently, to place it within the operation of a writ of error, which, in every case where the proceeding is according to the course of the common law, brings up the whole record; and in all these cases, as well as in the one first named, it is

because the evidence, whatever it may be, is made a part of the record by the proceeding, that the questions of law arising upon it become a proper subject of revision on the writ of error. 1 Chit. on Plead., 10th Am. Ed., 431; 1 Tidd's Prac., 3d Am. Ed., 586. And the same effect is produced and the same object is attained when the defendant demurs to the declaration, or when either party demurs to a material portion of the pleadings on which the cause depends; and so it must have been understood by this court in Gorman v. Lennox, 15 Pet. 115, where it was held, in accordance with the principle here advanced, that the action of the circuit court of this district, in sustaining a demurrer to a plea of performance in a suit on a replevin bond, was the subject of revision on a writ of error; and the rule adopted in that case was undoubtedly correct, as the effect of the demurrer was to make the error apparent in the record; and when that is so, it becomes the subject of revision just as much as when it is made to appear by a bill of exceptions or a special verdict."

In Clune v. United States, 159 U. S., 590, Mr. Justice Brewer, speaking for the court, said:

"An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, process, the verdict and the judgment, and such other matters as by some

statutory or recognized method have been made a part of it."

Recently the Circuit Court of Appeals of the Ninth Circuit, in the case of Mitsui v. St. Paul Fire and Marine Insurance Co., 202 Fed., 26, had this question under consideration, and at page 28 used the following language:

"From an inspection of the bill of exceptions it is at once manifest that no objections or exceptions were saved, and hence no questions of law arising at the trial can now be presented to or considered by this court. But this is no obstacle to the court's considering such questions as may arise upon the record and which it is not the office of the bill of exceptions to present.

The action of the court in overruling or sustaining a demurrer to the complaint is a matter which appears by the record, and no bill of exceptions is necessary for saving the questions pertaining thereto for the consideration of the appellate court. Whenever error is apparent upon the record, it is open to revision, whether it be made to appear by bill of exceptions or in any other manner. Suydam v. Williamson et al. 20 How. 427, 15 L. Ed. 978. And it was specifically held in Aurora City v. West, 7 Wall. 82, 19 L. Ed. 42, that, irrespective of the bill of exceptions, the writ of error brings up for review the decision of the court below in overruling a

demurrer. See, also, Young v. Martin, 8 Wall. 354, 357, 19 L. Ed. 418."

These decisions are declaratory of the common law. At common law, the ruling of the court upon a demurrer to a pleading has always been a proper subject of review upon error by the appellate court. This was true before a bill of exceptions was known. It was true when the higher court had no power to consider upon writ of error anything at all except those matters which appear upon the face of the record.

Prior to the enactment of the first English statute providing for a bill of exceptions, the only court which had the power to consider any external question of *fact* was the trial court itself. This was by writ of error *coram nobis* or *coram vobis*.

Pickett's Heirs v. Legerwood, 7 Pet., 144.
Stephen on Pleading (Tyler's Ed.), p. 142.

In other words, if any question of *fact* was to be considered upon writ of error, that could only be done under the writ of error *coram nobis*. This writ of error, like the writ of error proper, was sued out of chancery, commanding the judges of the trial court themselves to examine the record, and this the trial court had the power to do, in the light of the external facts which were produced in connection with such review. The same result sought to be accomplished by writ of error *coram nobis*, anciently, has been accomplished in modern times by a motion supported by affidavits. The writ of error proper, however, though issued in the same way, commanded the judges

to send the record to the court of appellate jurisdiction, and the appellate court was able to review every question of law which appeared on the face of the record, but was unable to consider any question of fact whatever.

This condition continued until the time of the reign of Edward I. In his reign the statute of Westminster 2, 13 Edw. I., c. 31, was enacted. Thereby provision was made for questions of fact and the rulings of the court thereon, which were presented and made in the course of the trial, to be incorporated into a bill of exceptions. This bill of exceptions the trial judge was required to seal. Thus the facts and decisions thereon, which were embraced within the bill of exceptions, were made to become a part of the record, and the ruling set forth therein became subject to review upon writ of error by the appellate court, just as it had always reviewed the questions of law arising upon the face of the record.

The bill of exceptions, therefore, in its origin and purpose, when properly prepared, embraced matters which were exclusively *dehors* the record. It in no respect changed the law as to what was already in the record. With such matters the bill of exceptions had no connection whatever. Those matters, prior to the statute of Westminster, had always been subject to review upon writ of error. They continued to be subject to review in the same way. The single and sole purpose of the bill of exceptions was to put extraneous matters presented or occurring at the trial upon the record, in order that issues of law arising thereon might also be considered by the appellate court.

In Coke upon Littleton, volume 1, in a note to section 155b, it is said:

> "And, as a check to the judge in the discharge of this duty, either party may, under the statute of Westminster 2, c. 31, make his exception in writing to the judge's direction, and enforce its being made a part of the record, so as afterwards to found error upon it."

Stephen on Pleading (Tyler's edition), at page 142, says:

> "When a writ of error is obtained, the whole proceedings to final judgment inclusive, are then always actually *entered* (if this has not before been done) on record, and the object of the writ of error is to reverse the judgment for some *error of fact or law* that is supposed to exist in the proceedings *as so recorded.*"

The author then proceeds to show that if it be an error of fact, the review can only be had by the writ of error *coram nobis*, and continues:

> "But the most frequent case of error is when, upon the face of the record, the judges appear to have committed a mistake *in law.* This may be by having *wrongly decided an issue in law* brought before them by demurrer, but it may also happen in other ways. As formerly stated, the judgment will in general follow success in the issue. It is,

however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, to *examine the whole record*, and then to adjudge either for the plaintiff or defendant, according to the legal right as it may on the whole appear, notwithstanding, or without regard to, the issue in law or fact that may have been raised and decided between the parties; and this, because the pleader may, from misapprehension, have passed by a material question of law without taking issue upon it. Therefore, whenever, *upon examination of the whole record*, right appears on the whole not to have been done, and *judgment appears to have been given for one of the parties when it should have been given for the other*, this will be an *error in law*. And it will be equally error, whether the question was raised on *demurrer*. * * * But * * * nothing will be error in law that does not appear *on the face of the record;* for matters not so appearing are not supposed to have entered into the consideration of the judges. Upon error in *law*, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment), but by a writ of error, requiring the record to be sent into some other court of appellate jurisdiction, that the error may be there corrected, and called a writ of error generally."

Blackstone, in his Commentaries, volume 3, at page 372, gives the following account and purpose of the above-mentioned statute:

> "The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth: so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated and by the judge are publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast. And if, either in his directions or decisions, he misstates the law by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a *bill of exceptions;* stating the point wherein he is supposed to err: and this he is obliged to seal by statute Westm. 2, 13 Edw. I., c. 31, or, if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated: and if he returns, that the fact is untruly stated, when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal; examinable, not in the

court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below."

In Encyclopaedia of Pleading and Practice, volume 3, at page 378, it is said:

"Prior to the statute of Westminster (13 Ed. I., c. 31), the only errors reviewable at common law on a writ of error were those apparent on the face of the record proper. The record proper consisted of the pleadings, process, verdict and judgment. Exceptions to rulings of the court during the progress of the trial were not brought up, as the oral or parol matters on which they were based were not incorporated in the record. The bill of exceptions being, accordingly, purely a creation of statute and unknown to the common law, it cannot be extended to cases not within the contemplation of the statute. The statute of Westminster was applicable only to civil cases sued in courts following the common law."

At page 404 of the same volume it is said:

"It is a general rule of appellate procedure that a bill of exceptions is useless, and indeed none should be brought up to the appellate court, where all the facts constituting the alleged error appear on the face of the record proper. The reason for this

rule is obvious, since the only purpose of the bill is to bring before the court in an authenticated manner facts which in the ordinary course of proceeding would not otherwise appear of record in the case."

We ask permission to cite from the Supreme Court of Florida an interesting discussion of the question, in the case of Barnes v. Scott, 11 Southern Reporter, page 48, where the court says:

"While the rule is well settled that exceptions must be taken and noted to all rulings of the court below that it is desired to have reviewed here, when such rulings are made during the progress of a trial concerning matters *in pais*, that are not and can never be a part of the record in the case, unless made so by bill of exceptions duly made up and authenticated by the signature and seal of the judge presiding, yet this rule, upon a writ of error, does not apply to rulings that are apparent upon the face of the record, and that are, per force of their very nature, a part of the record itself, and that appear from a simple transcript of the papers and proceedings that compose the record proper of the cause, without the help or addition of a bill of exceptions—such, for instance, as the rulings of the court upon demurrers to the different pleadings. When the matter submitted to the court for its decision, and the ruling thereon, is made to appear as a part of the legitimate record

proceedings in the cause, leading up as steps to the formation of the issues therein, then as to such matters there is no necessity for any exception in order to have it reviewed here, because in such cases a bare transcript of the papers filed in the cause, and that compose within themselves that which is the record of such cause, and the rulings of the court thereon, would upon their face exhibit the matter to be reviewed here without the aid of a bill of exceptions to make it appear. The distinction as to when it is and when it is not necessary to take or note exceptions to rulings upon which a review is desired, is thus very clearly put in Pow. App. Proc., p. 215:

'The only object of a bill of exceptions is to bring into the record the facts and the decision of the court, where it would not otherwise appear therein. Sometimes, when a matter transpires or a decision is casually made, and its objectionable character not readily perceived, the party is required to make his objection at the time in order to enable the matter to be corrected, if it is chosen to be, for otherwise it may be presumed that the matter was assented to or waived. But where a question is directly raised to the court to respond to it, as upon a demurrer, * * * no bill of exceptions is necessary.' "

We again wish to emphasize the fact that an exception is not to be separated from the bill of excep-

tions. If the former is necessary, the latter affords the only means of preserving it. It is true that a practice prevails in some states, as we are advised—certainly in Kentucky and probably in Wyoming—of appending to a judgment a form of exception, but this is a practice wholly unknown to the common law, and is of no importance here, except as it may serve to illustrate the danger of the federal courts falling into errors by inadvertently adopting the state practice.

It seems to us that no argument is necessary to show that the practice under discussion should be uniform in all of the courts of the United States. The rule adopted by the Supreme Court should prevail in all of the other federal appellate courts.

Hopkins, in his New Federal Equity Rules, at page 11, well said:

> "The primary object of all rules is to secure uniformity in practice. They relate to the adjective, not to the substantive, law. * * * Every lawyer wishes to comply with the rules of court. The difficulty of learning what the rules, written and unwritten, are, consumes much valuable time, which were better devoted to the merits of the controversies in the courts. * * * When the rule is clear, and courts deliberately depart from it, the result is an unfair embarrassment of the bar."

We assume that every conscientious member of the bar stands in more or less dread of the possibility

of some omission on his part resulting in the refusal of the court to pass upon the merits of his client's cause of action or defense. No lawyer is held blameless who fails to follow that procedure prescribed by the court, and made a condition precedent to the right to adjudicate the real issues of the controversy. We yield to no one in the sense of responsibility attaching to a lawyer in this respect. In an effort to know the proper practice and procedure upon the question under discussion, we have spared no pains. We have examined into every known source of information upon the subject—the statutes of the United States, the rules of this court and of the Court of Appeals, the common law, the decisions of this court, the practice in the Court of Appeals, and, finally, the history, including the origin and office, of the bill of exceptions. A careful examination of these subjects can lead to but one conclusion. That conclusion this court reached long before the courts of appeal were established, and that conclusion became a recognized, though unwritten, rule of procedure in all of the federal courts, without a single exception, so far as we have been able to discover, until the decision in this case. Our failure, therefore, to reserve an exception to the ruling of the trial court upon the demurrer to the third defense was no mere inadvertence. We deliberately failed to reserve an exception, for the reasons which we have herein set forth, being confident that to save such an exception was to evince an ignorance of the decisions of this court, and the rule of the common law on the subject, and would merely result in encumbering the record, and adding to the ultimate cost of the unsuccessful litigant by un-

necessarily and without authority bringing into the record, or pretending to bring into the record, by bill of exceptions, matters which already constituted and were a part of the record, and apparent on the face thereof.

With respect to a rule of practice which has prevailed from time immemorial, changes may become necessary. As respects the rule under consideration, we respectfully submit, however, that no reason based upon principle, convenience, or necessity can be given for its abrogation. In any event, if a rule of such long duration and uniform recognition is to be abrogated, the new rule, whether made by statute, written or unwritten rule of the court, should never be permitted to become retroactive in its operation. The adjective law, no less than the substantive law, if changed during the course of litigation, and made retroactive with respect thereto, proves disastrous to the rights of the litigant, and violates the spirit, if not the letter, of the Constitution of the United States. We urge, however, that there is no reason why any change should be made in the rule under discussion, and we express the hope that the additional burdens necessarily incident to such change, in preparation for reviews upon writs of error, will not unnecessarily be imposed upon the profession. In the interest of harmony in the practice and procedure in the federal courts of the United States, and in justice to our client, we respectfully urge that the new rule announced and enforced by the Circuit Court of Appeals in the case at the bar may be disapproved, and the rule once more announced by this tribunal in accordance with its previous declarations upon this important subject.

SECOND POINT.

THE THIRD DEFENSE RAISES THE QUESTION AS RESPECTS THE POWER OR AUTHORITY OF THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER TO ISSUE NEGOTIABLE CERTIFICATES OF INDEBTEDNESS.

The third defense was prepared in the light of the constitutional and statutory laws of the State of Colorado with respect to the use of voting machines. Section 8 of Article VII of the Constitution of said state, among other things, provides as follows:

> "Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of registering the votes cast at any election, provided that secrecy in voting be preserved."

Section 2341 of the Revised Statutes of Colorado of 1908, found also as section 5 of the Session Laws of Colorado of 1905 at page 222, reads as follows:

> "No voting machine shall be approved by the board of voting machine commissioners unless it shall be so constructed as to insure every voter an opportunity to vote in secrecy; that it can be closed during the progress of the voting so that no person can see or know the number of votes registered for any candidate or for whom the elector

has voted; that each machine shall be so constructed as to provide facilities for voting for the candidates of at least seven parties or organizations with a separate voting device and counter for each candidate thereof; that a straight party ticket can be voted by the operation of a single device; that the voter may vote for a part of one party ticket, and a part of one or more other party tickets; that a voter cannot vote for a candidate or on a question for whom or on which he is not lawfully entitled to vote; that the voter will be prevented from casting more than one vote for any candidate, or voting for more than one person for the same office, unless he is lawfully entitled to vote for more than one person therefor, and in that event permits him to vote for as many persons for that office as he is by law entitled to vote for, and no more, but all votes for nominated candidates for such officers shall be cast and counted in the same manner as for all other nominated candidates, except as hereinafter provided for presidential electors; that the machines will be provided with at least seven pairs of 'Yes' and 'No' counters for voting on questions, with the operating or voting devices therefor; that such machine will correctly register, by means of mechanical counters, having registering wheels, every vote cast for candidates whose names are printed on the ballot labels or for questions; that the names of the can-

didates for presidential electors shall not occur on the ballot labels, but in lieu thereof, one ballot in each party column, or row, shall contain only the words 'Presidential Electors,' preceded by the party name, and the names of the candidates for president and vice-president, and every vote registered for such ballot shall operate as a vote for all candidates of such party for presidential electors, and be counted as such, but it shall provide means for voting a split or irregular ticket for presidential electors; that any voter can by means of irregular ballots vote a written or printed ballot of his own selection for any person for any office, although such person may not have been nominated by any party, but such irregular balloting device or devices shall not be used for voting for any regularly nominated candidates, except for presidential electors, as herein provided; that a voter may readily understand how to vote, and within the period of one minute cast his vote for all the candidates of his choice and that he can change his vote for any regularly nominated candidate up to the time he starts to leave the machine. All voting machines shall have their voting devices for the individual candidates arranged in separate parallel party lines, one line for each party, and in parallel office rows, transverse thereto; each machine must be provided with a lock or locks, the keys of which can not be inter-

changeably used, and by the locking of which any movement of the operating machanism can be prevented, so that it can not be tampered with or manipulated for any fraudulent purpose; and that the doors of the compartment containing the registering mechanism can be locked so that no person can see or know the number of votes registered for any candidate; there shall be a counter, the registering face of which can be seen at all times from the outside of the machine, which will show during the election the total number of voters that have operated the machine at that election; there shall be a registering lock, or a counter, which can not be reset and will lock by the part that operates it, and will count up to a million; such lock or counter shall be known as a protective lock, or a protective counter, and shall be so constructed that the numbers on the lock will be changed or the number on the counter shall be advanced one every time the machine is operated. With each voting machine there shall be provided by the makers a working model for instruction of voters, which shall represent at least five office lines for two party rows, and the devices for voting for two questions, and shall correspond to the equivalent parts on the face of the voting machine, and the operation of the model shall be the same in outward appearance as the operation of the machine."

It will be observed that, under the provision of the Constitution above set forth, a ballot machine may not be used at all, unless of such character that the secrecy of the ballot is preserved. Among the various qualities which the statute requires in a voting machine are: (1) it must preserve the secrecy of the ballot; (2) it must be so constructed that an elector may cast his vote within the period of one minute; (3) it must be possible for an elector to vote a straight party ticket by the operation of a single device; (4) it must be possible for the elector to vote a mixed ticket; (5) it must not be possible for an elector to vote for a candidate or on a question for whom or on which he is not lawfully entitled to vote; (6) it must be possible for the elector to vote a split or irregular ticket for presidential electors; (7) it must be impossible, after the machine has been locked, for it to be tampered with or manipulated for any fraudulent purpose.

These provisions of the statute will be sufficient to render clear the sufficiency of the answer.

The third defense, set forth beginning at page 3, *supra*, and found at page 17 of the Record, alleges that the consideration for the certificate of indebtedness and interest coupon had wholly failed; that they were executed in part payment for voting machines; that under the agreement of purchase the Federal Ballot Machine Company had guaranteed that each of said machines would conform in every particular to the Constitution and statutes of the state with respect to the holding of elections by means of voting machines, and that they would perfectly and accurately perform the work of voting machines, as required by

said laws. It is then alleged that the machines do not conform in every particular to the requirements of the Constitution and statutes of the State of Colorado in respect to the holding of elections by means of voting machines, and do not perfectly or accurately perform the work as required by the Constitution and laws in that the secrecy of the ballot cannot be preserved; the mechanism of the said machine is so intricate and complicated that an elector cannot vote at all within the limit of one minute; it is impossible for an elector by the use of the said machines to vote a straight ticket, mixed ticket, or an irregular ticket, or any one of them, within the limit of one minute; it is impossible for an elector, by the use of the machine, secretly to vote a split or irregular ticket; the machines are so constructed that after they have been locked they are easily and readily manipulated in such a way as to render possible the placing of fraudulent ballots therein; the construction of the machine is such that an elector cannot cast a vote for presidential electors without first divulging the name of the person for whom he so desires to vote, and also that it is impossible for an elector to vote for any particular individual electors; where there are as many as seven tickets it is impossible for an elector to vote for an independent candidate, and it is impossible by the use of said machine to vote a straight ticket by a single device; the machines are so constructed that they do not prevent a voter from voting for a candidate or on a question for whom or on which he is not entitled to vote; and the machines do not correctly register every vote attempted to be cast either for candidates or on questions submitted to a vote.

Assuming these allegations to be true, as it must be assumed, in considering the answer upon demurrer, the machines are shown to be utterly worthless, in that they cannot be used at all without violating the law.

In other words, this third defense would have been an absolute bar to an action upon the certificate of indebtedness and interest coupon, if an action had been instituted thereon by the payee therein. The defense is equally a bar to the present action, if it be true that the certificate of indebtedness is not a negotiable instrument. The certificate of indebtedness is not a negotiable instrument, if, as a matter of law, the Board of County Commissioners of the City and County of Denver was without authority to issue a negotiable certificate of indebtedness.

Whether the Board of County Commissioners had authority to issue a negotiable certificate of indebtedness is purely a question of law. For us to have alleged that the Board of County Commissioners had no power or authority to issue negotiable certificates of indebtedness would have been to state a legal conclusion, in violation of an elementary principle of pleading. To interpose a defense to a complaint setting forth *in hacc verba* the instrument sued on, which is good only upon the theory that the instrument is not negotiable, always raises the question as to whether said instrument is negotiable in form. If executed by an agent and the power of the agent is one conferred by law, of which the court takes judicial notice, it equally raises the question as respects the authority of that agent to issue an instrument which shall be negotiable. If

it be said that the certificate sued on was in fact negotiable in form, we answer that, whatever the form, its effect must be determined in the light of the power or authority of the board which issued it. We repeat that this power and authority are to be determined, not upon any facts which the defendant might have alleged, but upon pure propositions of law of which the court takes judicial notice.

In the case of the ordinary agent whose authority is prescribed by contract, the person complaining of the exertion of an unauthorized power must allege the facts which show the act complained of to have been unauthorized, or must allege that the act complained of was in excess of the agent's authority. Where, however, the authority of the agent is prescribed by law, the court takes judicial notice of the extent of that authority, and if a power is exerted in excess of that conferred by law, the court, as a court, knows, without additional facts, that the act is void.

This serves to illustrate the difference between the rule of pleading, as applied to the ordinary agent whose powers are fixed by contract, and public officials, such as a board of county commissioners, whose powers are fixed and determined by law. Upon this principle of pleading the third defense merely alleged facts which established a failure of consideration—a defense which would have been valid as against the original payee of the certificate. This defense is also valid as against the plaintiff, though a *bona fide* holder in due course, if it be true in point of law that the certificate sued upon was non-negotiable for lack of power in the Board of County Commissioners to issue such a certificate.

It results, therefore, that we effectually answer any argument based upon the suggestion that the certificates are negotiable in form, when we show that the court, as a court, knows as a matter of law that the Board of County Commissioners had no power or authority to issue negotiable certificates.

Assuming, as to us seems clear and without question, that the third defense stated facts which would constitute a defense as between the petitioner and the original payee, the single additional question raised thereby was with respect to the authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness. The very basis of the defense was the absence of power, under the laws of Colorado, in the Board of County Commissioners to issue a negotiable certificate, and if the certificate was negotiable in form, it was a palpable case of the exertion of an act by a public official in excess of the authority conferred by law.

The proposition that this defense properly raised the question as respects the authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness was, so far as we know, never at any stage of the proceeding drawn in question, nor has it yet been drawn in question, except by certain possible inferences contained in the opinion of the Circuit Court of Appeals. But for certain language therein contained, we should not have felt that it was proper or necessary to advert to this question.

THIRD POINT.

NEITHER SECTION 8 OF ARTICLE VII OF THE CONSTITUTION OF COLORADO, NOR THE ACT OF 1905, AUTHORIZES THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER TO ISSUE NEGOTIABLE CERTIFICATES OF INDEBTEDNESS, AND THE CERTIFICATE AND COUPON SUED UPON, BEING NEGOTIABLE IN FORM, ARE THEREFORE ABSOLUTELY VOID.

Section 8 of Article VII of the Constitution of the State of Colorado, so far as material to the question now being discussed, provides as follows:

> "When the governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine, or voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, but shall not be issued or sold at less than par."

Section 2342 of the Revised Statutes of Colorado of 1908, found also as section 6 of the Session Laws of Colorado of 1905, at page 224, so far as material, provides:

> "The governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, adopting and purchasing a voting machine, or voting machines, may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness or other obligation, which shall be a charge upon such county, city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time, or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par."

It is conceded that the Board of County Commissioners is the governing body of the City and County of Denver in its capacity as a county, and the certificate of indebtedness in question upon its face discloses that it was issued by the Board of County Commissioners.

It is to be observed that in both the Constitution and the statute the authority is to issue "interest-bearing bonds, certificates of indebtedness or other obligations." Aside from bonds and certificates of indebtedness, the only other obligations which the county might have availed itself of were probably

ordinary county warrants or promissory notes. When the Board of County Commissioners determined to purchase voting machines, under the authority thus granted by the Constitution and statute, they were permitted to provide for the payment therefor by the issuance of either (1) interest-bearing bonds, (2) certificates of indebtedness, or (3) warrants or promissory notes.

The municipal authorities apparently decided not to issue interest-bearing bonds, and not to evidence the debt of the Ballot Machine Company by warrants or notes, but selected, for the purpose of evidencing the obligation, the form of "certificate of indebtedness" hereinabove set out. For the purpose of this case we may therefore eliminate from the constitutional and statutory provisions any reference to bonds or municipal obligations other than certificates of indebtedness. Accordingly, the authority under which the Board of County Commissioners acted, when it issued the certificate sued on in this case, was the grant of power to issue certificates of indebtedness. If the constitutional and statutory provision conferred upon the county officials any larger powers, they did not choose to avail themselves of them. Does, then, a grant of power to a municipality to issue certificates of indebtedness carry with it by necessary implication the power to make such certificates negotiable?

It is common learning that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given or necessarily implied, because essential to carry into effect such as are expressly granted,

and that the bonds or other obligations of such corporations are void unless there be express or implied authority to issue them.

Barnett v. Denison, 145 U. S., 135.
Ottawa v. Carey, 108 U. S., 110.
Merrill v. Monticello, 138 U. S., 673.
Nashville v. Ray, 19 Wall., 468.

As said in the case of Brenham v. Bank, 144 U. S., 173:

> "Any doubt as to the existence of the power of a municipality ought to be resolved against its existence."

It must be conceded that the grant of authority contained in the above provisions of the Constitution and statutes of the State of Colorado to issue certificates of indebtedness was not an *express* grant of power to issue *negotiable* certificates of indebtedness. If the Board of County Commissioners of the City and County of Denver had any authority whatever to issue a negotiable certificate of indebtedness which would circulate as commercial paper, and deprive the county of any defense which it might have against the payee therein named, it can only be by virtue of some implication which the court shall deduce from the language of the grant of power as being necessary to carry out the intent of said laws.

It is now well settled that the grant of power to a municipal corporation to borrow money, or to contract an indebtedness, carries with it power to issue

bonds or other instruments evidencing the loan or indebtedness, but does *not* authorize the municipality to issue *negotiable* bonds.

Merrill v. Monticello, 138 U. S., 673.

City of Brenham v. German American Bank, 144 U. S., 173.

National Bank v. School District, 56 Fed., 197.

German Insurance Co. v. City of Manning, 95 Fed., 597.

In the case of City of Brenham v. German American Bank, *supra*, the city council of the town of Brenham, in the State of Texas, was given the power and authority to borrow for general purposes not to exceed $15,000, on the credit of the city. This grant of power was contained in section 2 of an act of the legislature of Texas, passed in 1873, incorporating the city of Brenham. One of the sections of the same act provided that the *bonds* of the city of Brenham should not be subject to the tax under this act. The court held that, under its grant of power to borrow money, the city could give to the lender, as a voucher for the repayment of the money, evidence of the indebtedness in the shape of non-negotiable paper, but there was nothing in the language of the charter which could be construed, either expressly or by implication, to confer the power to issue negotiable interest-bearing bonds. The court said:

> "It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable

bonds, and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case."

The following language of Mr. Justice Lamar, in the case of Merrill v. Monticello, *supra*, was cited with approval:

"It is admitted that the power to borrow money or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness by the corporation to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and perhaps most generally in the form of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in the open market a bond as a commercial security, with immunity in the hands of a bona fide holder for value, from equitable defense. * * * It does not follow that, because the town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds, and put them on the market as evidences of such loan. To borrow money and to give a bond or obligation therefor, which may circulate in the market as negotiable security, free from any equities that may be set up by the maker of it, are, in their nature

> and in their legal effect, essentially different transactions. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan, nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality."

If the Board of County Commissioners in the present case had issued bonds instead of certificates of indebtedness, we should have had no little difficulty, under the authority of the Brenham and Monticello cases, *supra*, in understanding how the mere grant of power to issue bonds could carry with it the power to issue *negotiable* bonds. If the power to borrow money by necessary implication carries with it the power to evidence the loan by the issuance of a bond, it seems to us that the power construed in the Brenham and Monticello cases, coupled with this necessary implication, is precisely equivalent to the power to issue bonds, and whether the power granted was to issue bonds or to borrow money, the municipality would be without authority to make such bonds negotiable, in the absence of an additional grant conferring that specific power.

In the case of West Plains v. Sage, 69 Fed., 943, it was held by the United States Circuit Court of Appeals of the Eighth Circuit, in an opinion by Judge Sanborn, Judge Thayer concurring and Judge Caldwell dissenting, that an express power to issue bonds carries with it by implication the power to issue negotiable bonds. Judge Sanborn said:

> "The act under consideration in this case authorized this township to issue new bonds, without any restriction as to their negotiability. This grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. The usual—nay, it may almost be said, the universal—form of such securities is that of a negotiable bond, payable to bearer, and in our opinion it was bonds in this form, and in no other, that the legislature of Kansas had in mind, and intended to give this township power to issue by this act."

We submit that this reasoning ignores the inevitable logic of the cases above cited. If this reasoning is correct, it is equally correct to say that the express power to borrow money carries with it by implication the power to issue that form of security in evidence thereof which is usual or almost universal in commercial transactions.

This court, however, recognizing the strict rule determining the power of municipalties, has held that the authority to borrow money will authorize the issuance of a bond in evidence thereof, but not a negotiable bond. Now, what is necessarily implied is the same as if it had been expressly granted, and if the power to borrow money by necessary implication carries with it the power to issue bonds, then expressly to confer the power to issue bonds is to do no more than was necessarily implied in the power to borrow money.

In other words, the power with respect to the issuance of bonds, when that single and sole power is expressly conferred, carries with it no greater power than was carried by necessary implication when the power to borrow money was expressly conferred. If in the latter the power to issue bonds does not mean the power to issue negotiable bonds, then the former, while authorizing the issuance of bonds, will not carry by implication the power to issue negotiable bonds.

Judge Caldwell, in his dissenting opinion in the Sage case, obviously took this view. He said:

> "It is obvious that no recovery can be had on the bonds in suit, if we apply to the facts of this case the well settled rules of law relating to the power of municipal corporations to issue bonds, and the rules which determine when such corporations are and when they are not precluded from availing themselves of meritorious defenses to such obligations."

After reviewing various decisions of this court, and something of the history of legislation in the State of Kansas, Judge Caldwell continues:

> "Under a carefully guarded act, which bears evidence in its every line of a settled purpose on the part of the legislators to limit the powers of the officers acting thereunder to the issue of non-negotiable bonds in compromise of the then existing indebtedness of the municipalities of the state, the majority of

the court hold that it is open to the officers of every county, city, town, school district, and township in the state of Kansas to issue the negotiable bonds of the public corporations named, without any consideration, and for all manner of illegal purposes, and to any amount, and make them binding obligations by simply inserting in them the false recital that they were issued under the act mentioned; and that the purchasers of such bonds are not chargeable with notice of the requirements of the act under which they purport to be issued, nor with notice of what the records of the municipality disclose in relation to their issue. This is going much further than the supreme court of the United States has ever gone, and is in palpable conflict with the later decisions of that court which are cited in this opinion."

Regardless, however, of what kind of a bond might have been issued, the fact is, the Board of County Commissioners did not attempt in this case to issue a bond at all; it only pretended to issue a certificate of indebtedness. So far as this case is concerned, therefore, it is only necessary to consider whether the power to issue certificates of indebtedness carries with it by implication the power to issue negotiable certificates of indebtedness.

A bond is a form of obligation well known in the commercial world, and the form in use for the different classes of securities has become more or less stereotyped. It is no doubt for this reason that Judge

Sanborn said, in the Sage case, *supra*, that the grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. A municipal certificate of indebtedness, on the other hand, is not a commercial instrument, commonly understood to be negotiable. The term itself cannot be said to have any popular or ordinary significance. The mere acknowledgement of receipt of property purchased by the county, and the amount due, would be a certificate of indebtedness, but would certainly not be negotiable.

Conceding, therefore, for the purpose of the argument, and not otherwise, that the power to issue bonds carries by implication the power to issue negotiable bonds, upon the theory that that is the popular signification of the term "bond," unless restricted by express words, yet for the very same reason a grant of power to a municipality to issue certificates of indebtedness cannot fairly be said to be a grant of power to issue negotiable certificates of indebtedness.

If, in its popular meaning, the term "certificates of indebtedness" connotes any idea at all as to negotiability, it will probably be a general idea that such an instrument in non-negotiable. Moreover, if conjectures are to be indulged in as to whether the power to issue certificates of indebtedness confers the right to make them negotiable, and there are no countervailing considerations, as in the case of bonds, which it is claimed have a well-known and usual form, then, under well-settled rules of construction, the existence of the power must be resolved against the municipality.

We submit, therefore, that the case of West Plains v. Sage, *supra*, is not only not decisive of this contro-

versy, even conceding its soundness, but, indeed, is not in point at all. The power to issue certificates of indebtedness differs quite as radically from the power to issue bonds as the power to issue bonds differs from the power to borrow money. Indeed, the power to borrow money has been repeatedly construed to imply the power to issue bonds; but we think the books can be searched in vain for a statement from any tribunal that the power to issue bonds is equivalent to or implies the power to issue certificates of indebtedness. Certainly no express power was granted to the City and County of Denver to issue *negotiable* certificates of indebtedness, nor can it be said that such obligations have any customary and usual form which is negotiable. On the contrary, any acknowledgment of a debt, as above indicated, even if it be nothing more than a mere receipt, would be a certificate of indebtedness. When we add, therefore, to the popular conception that a certificate of indebtedness is probably not negotiable, the rule of construction that every presumption is to be indulged against the existence of a power not necessarily granted or implied, the result seems to lead inevitably to the conclusion that the statutes and Constitution of Colorado conferred no power upon the Board of County Commissioners of the city of Denver to issue negotiable certificates of indebtedness.

In the case of National Bank v. School District No. 7, 56 Fed., 199, Judge Thayer, speaking for the Circuit Court of Appeals of the Eighth Circuit, and referring to the case of Brenham v. Bank, *supra*, said:

> "It is unnecessary for us to assert that the decision last referred to goes to the full

extent last indicated of holding that a municipal corporation can only acquire authority to issue negotiable securities by a statute which confers such power in express language, and that the power will not be implied under any circumstances. We think, however, that we may fairly affirm that the two authorities heretofore cited do establish the following propositions: first, that an express power conferred upon a municipal corporation to borrow money for corporate purposes does not in itself carry with it an authority to issue negotiable securities; second, that the latter power will never be implied in favor of a municipal corporation, unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory; and, third, that in every case where a doubt arises as to the right of a municipal corporation to execute negotiable securities, the doubt should be resolved against the existence of such right."

In Coffin v. Board of County Commissioners, 57 Fed., 139, Judge Thayer, again speaking for the Circuit Court of Appeals of the Eighth Circuit, said:

"Finally, it is proper to call attention to the rule of law which requires the authority of a municipal corporation to issue negotiable paper to be clearly made out and established, whenever the existence of such a power is called in question. A power of that

> nature will not be deduced from uncertain inferences, and can only be inferred from language which leaves no reasonable doubt of an intention to confer it."

Certainly the power to issue certificates of indebtedness cannot be said beyond any reasonable doubt to confer the power to make such certificates negotiable, especially when the effect of such a rule is utterly to deprive taxpayers of a municipality of any defense against the collection of obligations, such as the certificate in question, although the consideration for the issuance of such an obligation has utterly failed.

In this case, if the court should hold the certificate of indebtedness in question void as a negotiable instrument, beyond the power of a municipality to issue it, the plaintiff cannot be injured if the county has ever received any consideration for the issuance of this large amount of securities. The creditor may recover, as for goods sold and delivered, and the holders of a void certificate of indebtedness will be subrogated to the rights of the creditor. The only practical effect of a decision in favor of the validity of the certificate of indebtedness in question would be to deprive the county of a valid defense against a worthless purchase.

It is, of course, well settled that if a municipality issues bonds or other obligations, negotiable in form, when no power has been conferred to utter negotiable instruments, the securities are void, and no recovery can be had on them as non-negotiable instruments. If the City and County of Denver had no authority to issue negotiable certificates of indebtedness, and the

certificates so issued were negotiable in form, they were absolutely void for all purposes. A recovery might be had for goods sold and delivered, but no action can be predicated upon the obligation itself.

Mayor v. Ray, 19 Wall., 468.
Merrill v. Monticello, 138 U. S., 673.
Hedges v. Dixon Co., 150 U. S., 182.
Swanson v. Ottumwa, 131 Ia., 547.

FOURTH POINT.

EVEN IF THE CONSTITUTIONAL PROVISION AND STATUTE IN QUESTION SHOULD BE HELD TO AUTHORIZE THE ISSUANCE OF NEGOTIABLE BONDS, THE SECURITY SUED ON IN THIS ACTION IS NOT A BOND, IS NOT NEGOTIABLE, AND THEREFORE THE PLAINTIFF TOOK IT SUBJECT TO ANY EQUITIES EXISTING BETWEEN THE COUNTY AND THE PAYEE.

Moreover, a municipal certificate of indebtedness, even though negotiable in form, has been repeatedly held not to be a negotiable instrument in the sense that any defense which the municipality may have against the payee will be cut off by a transfer for value before maturity to a *bona fide* purchaser.

A certificate of indebtedness and a county warrant are to be distinguished from county bonds. A bond is a new debt, or constitutes the evidence of a new debt, while a warrant or certificate of indebtedness is merely the evidence of a debt already con-

tracted. This distinction runs through the cases, and is clearly stated by Judge Dillon in the fifth edition of his work on Municipal Corporations, volume 2, page 1284, as follows:

> "The warrant does not constitute a new debt, or evidence of a new debt, but is only the prescribed means for drawing money from the municipal treasury to pay an existing debt. State v. Cook, 43 Neb. 318. It may also be laid down that, as a general rule, the power to issue a warrant does not exist until the audit and allowance of the claim in the manner prescribed by statute."

At page 1273 of the same volume, the opening paragraph of the chapter on Warrants on Municipal Treasury reads as follows:

> "Orders or drafts drawn by one city officer upon another, and vouchers for moneys due, certificates of indebtedness for services rendered or for property furnished for the use of the city, or any device of the kind, issued for liquidating the amounts due to the public creditors, are necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes."

It is to be observed that Judge Dillon treats warrants, vouchers for money due, and certificates of indebtedness as the same class of obligations. The certificate of indebtedness in question recites on its face

that, a claim having been presented against the City and County of Denver for voting machines, and the claim having been allowed for the amount of the certificate, the obligation was issued to evidence the existence of the debt. Unlike a bond, it did not, to use the language of Judge Dillon, constitute a new debt or evidence of a new debt, but was simply the means of drawing money from the municipal treasury to pay an existing debt.

In the case of Watson v. City of Huron, 97 Fed., 449, Judge Caldwell, delivering the unanimous opinion of the Circuit Court of Appeals of the Eighth Circuit, said:

> "But the certificates of indebtedness issued in this case are not negotiable bonds, but mere warrants or orders of the city treasurer, directing him to pay to the holder thereof the sum of money out of funds in the treasury. Such instruments are not subject to the rules of the law merchant, or in any manner to be treated like negotiable bonds. Whatever differences of opinion may have existed among the courts fifty years ago, as to the negotiability of such warrants, the courts are now unanimous that, while such warrants establish prima facie the validity of the claims allowed, and authorize their payment, they have no other effect; that they are in form negotiable, and transferable by delivery, so far as to authorize the holder to maintain in his own name an action on them, but they are not negotiable instruments in the sense of the law merchant, so that, when

held by a bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded."

In the case of Nashville v. Ray, 19 Wall., 468, Mr. Justice Bradley also speaks of vouchers for money due, certificates of indebtedness, orders, warrants, and drafts as being comprised within the same class of municipal obligations. In this case he used the following language:

"Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to the public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes; but to invest such documents with the character of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, un-

less conferred by legislative enactment, either express or clearly implied."

In Dillon on Municipal Corporations, fifth edition, volume 2, page 1295, it is said:

"The question whether there is any implied power in the officers of a town, county or city corporation to issue warrants or orders which shall be free from equities in the hands of holders, has been disposed of by a long line of decisions, which denies warrants or orders the principal attribute of negotiability, that is, freedom in the hands of bona fide transferees from equities in favor of the municipality. This result is arrived at as much by reason of the object or purpose intended to be attained by these instruments, as by a consideration of the lack of power inherent or implied on the part of municipalities to make and issue negotiable instruments without clear statutory authority therefor. * * * It would overwhelm municipalities with ruin to hold that such warrants or orders have the quality of negotiable paper, especially that quality which protects an innocent holder for value from defenses of which he has no notice, actual or constructive. All holders of such warrants or orders, even when payable to order of bearer, stand in the shoes of payee, and their rights and remedies are often essentially different from those of the holders of authorized negotiable municipal bonds. Such is the

sound doctrine, and such is the doctrine of the authorities without exception."

As has been said, Judge Dillon, when speaking of warrants and orders, seems to include also ordinary municipal vouchers or certificates of indebtedness, and to distinguish such securities from municipal bonds, in that the latter evidence a new debt, while the former are merely evidences of debts already contracted, or claims against the municipality already allowed.

It seems to us, therefore, unquestionable that the certificate of indebtedness in question in the instant case was intended by the municipal authorities to be an obligation radically different from a municipal bond. The certificate recites on its face that the debt for which it is issued had already been contracted, and the claim against the county had already been allowed. The certificate was intended to evidence the existence of that obligation, and seems to us, so far as its negotiability is concerned, to differ in no essential particular from a municipal warrant. The fact that it contains all the elements of negotiability is immaterial. Municipal warrants may also be negotiable in form, but the courts will assume, in the absence of some clear and unequivocal grant of authority, that a municipality is without power to make negotiable its warrants or certificates for debts already contracted.

If a municipality proposes to borrow money, there is some reason for implying the power to issue negotiable bonds to evidence the new debt; but if the debt has already been contracted, there is no reason what-

ever for conferring or implying the power to issue negotiable instruments in payment therefor. After a claim has been allowed against a county, the claimant is merely a simple contract creditor, and for the municipal officials to be permitted to discharge simple contract debts by the issuance of negotiable paper, which may pass into innocent hands, and thereby preclude any defenses which the county may later on discover, is not only the worst kind of business, but a principle of law which, we submit, should cause this tribunal long to hesitate before writing it into the jurisprudence of this country.

As said by Mr. Justice Bradley in Nashville v. Ray, *supra*, to do so "has the effect of converting a municipal corporation into a trading company, and puts it in the power of corrupt officials to involve the community in irretrievable bankruptcy."

In conclusion, we desire to call the court's specific attention to the allegations of the defendant's answer as set out on pages 17 and 18 of the Record. A hasty perusal of this defense, upon which the county proposes to rely, cannot fail to impress the court with the pernicious effect of a decision in this or similar cases that securities of the kind sued on in this case are negotiable.

Assuming, as we must, under the allegations of the third defense, that the consideration for the certificate in question has utterly failed, to hold the instrument in question negotiable is giving solemn sanction to the flotation by municipal officials, without any vote of the electors, of a large amount of

securities, merely evidencing the existence of a debt already contracted, and due at the date of their issuance, and against which the county later discovers it has a complete defense. The disastrous consequences of such a doctrine cannot well be exaggerated.

This consideration is particularly impressive in the light of Judge Caldwell's remarks in his dissenting opinion in the Sage case, *supra*. As that learned judge well said, if the county owes the money evidenced by the security in question, a recovery may be had by the creditor without reference to the instrument evidencing the obligation for goods sold and delivered, and the holder of the certificate of indebtedness in this case would be subrogated to the rights of the creditor. If the county, however, obtained nothing in exchange for the obligation here sued on, and consequently owes nothing in good morals, then to hold this certificate negotiable is to encourage the issuance by corrupt officials, with limited and restricted powers, of commercial paper, immune from any defense in the hands of *bona fide* holders for value.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1912.

No. 126

THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER,
Petitioner,

vs.

THE HOME SAVINGS BANK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT.

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Cases Cited.

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BRIEF FOR RESPONDENT.

STATEMENT.

This action was tried in the Circuit (now District) Court of the United States for the District of Colorado before a jury. (Printed Rec., 20; Rec., 22.)

The issues of fact upon the pleadings were as follows:

1. The plaintiff alleged that the "negotiable bond or certificate of indebtedness" and its second coupon, both set forth *in haec verba,* were, on the twentieth day of February, 1908, duly executed, issued, negotiated and delivered by the defendant to the Federal Ballot Machine Company.

2. That the said Machine Company, prior to maturity of either bond or coupon, sold, negotiated, transferred, endorsed and delivered said "negotiable bond or certificate of indebtedness" and said coupon to the plaintiff for value.

3. That said "bond or certificate of indebtedness" and said coupon were duly presented, payment demanded and refused and protest was made therefor and the same were still due and unpaid. (Printed Rec., 1-6; Rec., 1-6.)

The defendant filed no general demurrer, but answered and afterwards filed its amended answer.

The amended answer set forth three defenses separately stated:

1. A denial of the negotiation and endorsement "of the bond or certificate of indebtedness" or the coupon before maturity for value or otherwise. (Printed Rec., 9, 10; Rec., 10.)

2. The second and third defenses alleged failure of consideration, but the second defense alleged as preliminary matter, "upon information and belief, that the plaintiff is prosecuting this action under an agreement with the Federal Ballot Machine Company or with someone acting in its behalf, but whose name is to the defendant unknown, to the effect that the plaintiff shall be indemnified and saved harmless against the cost and expense of this action, and that the said Federal Ballot Machine Company is the real party in interest in this action." (Printed Rec., 10; Rec., 10, 11.)

After the allegation just quoted, which is not in the third defense, the second defense proceeds in language that constitutes word for word the whole of the third defense as follows:

That the consideration for both instruments has wholly failed; that said instruments were part payment for 150

voting machines under an agreement with the defendant containing a guaranty that the machines should correspond in every particular to the constitution and statutes of Colorado as to holding elections, and that they should accurately and perfectly perform the work of voting machines as required by such constitution and statutes.

That the said machines failed to so conform in a number of alleged particulars which are set forth. (Printed Rec., 10-12; Rec., 11-13.)

A general demurrer to the third defense was sustained by the court, but no exception was asked or entered upon the record by the defendant to this ruling. (Printed Rec., 13; Rec., 14.) The case being at issue upon the complaint and the first and second defenses the cause came on for trial.

From the bill of exceptions taken at the trial by the defendant, now petitioner, it appears that the plaintiff, now respondent, upon the trial introduced its evidence. (Printed Rec., 23-60; Rec., 25-66.)

The plaintiff, although it could have proved the endorsements on the certificate and coupon and then relied upon the legal presumption of holder in good faith for value before maturity, nevertheless went farther, and having proved the endorsements and the authority therefor, then disproved the first defense and the first allegation of the second defense and showed that the certificate with its coupons, *the first of which was afterwards paid by the defendant*, was sold to plaintiff by a bond house in due course of business for value in good faith before maturity, and upon the opinion of counsel (Printed Rec., 53, 54; Rec., 58, 59), without any notice or knowledge of any kind as to any defect in the paper or as to any defense, and the payments of the purchase price

were shown by checks duly paid through the clearing houses. (Printed Rec., 57, 59; Rec., 63, 65.) Proof was made of the demand and protest for non-payment.

Thereupon the plaintiff rested and then the defendant, offering no evidence (Printed Rec., 60; Rec., 66), moved the court for a non-suit "based upon the questions of law already raised by the defendant in the motion to strike parts of the complaint, and again raised in demurrer to the answer" (we quote the bill of exceptions), which motion was denied by the court (Printed Rec., 60; Rec., 66), and the defendant excepted.

Thereupon the defendant moved for a directed verdict on its behalf, which was denied by the court and the defendant excepted (Printed Rec., 60, 61; Rec., 66), and rested without offering any evidence whatever.

Whereupon the plaintiff moved for a directed verdict on its behalf, which motion was granted by the court and judgment ordered to be entered, and thereupon the defendant excepted to such direction and the entry of judgment. (Printed Rec., 61; Rec., 66.)

Both plaintiff and defendant having moved for a directed verdict, there was no question for the jury to pass upon, under the well settled rule in the Federal courts.

Buetell v. *Magone* (1895), 157 U. S., 154.
Pensacola State Bank v. *Merchants' etc. Bank* (1910), 180 Fed., 504.
Bradley Timber Co. v. *White* (1903), 121 Fed., 779.
Mead v. *Darling* (1908), 159 Fed., 684.
Anderson v. *Messenger* (1907), 158 Fed., 250.
Love v. *Scatcherd* (1906), 146 Fed., 1.
West v. *Roberts* (1905), 135 Fed., 350.
Insurance Co. v. *Wisconsin Central Ry. Co.* (1905), 134 Fed., 794.

This is likewise the rule in *Colorado-Saxton* v. *Perry* (1910), 47 Colo., 263.

The errors specified in petitioner's brief at page 8 *as the only ones which are relied upon,* do not refer to any exception taken upon the trial, but are confined to the ruling upon and the sustaining of the demurrer. The errors assigned upon the proceedings had at the trial and contained in the bill of exceptions, on exceptions taken at the trial, and being assigned errors Numbers 6, 7, 8, 9 (Printed Rec., 63; Rec., 69), are to be deemed as waived, since they are expressly disclaimed in the petitioner's brief. The substance of the error now claimed is that the paper was void.

The bill of exceptions affirmatively shows that upon the trial the only points urged for the motion for a nonsuit are the same points as were urged by defendant on the motion to strike out parts of the complaint and again raised upon the argument of demurrer to the third separate defense. (Printed Rec., 60; Rec., 66.)

Those points were denominated in petitioner's bill of exceptions "questions of law" (Printed Rec., 60; Rec., 66), namely, that the instruments sued upon were not negotiable as affirmatively appeared from the complaint. (Printed Rec., 8; Rec., 9.) This motion to strike out the word "negotiable" from the complaint had been denied and no exception taken or settled (Printed Rec., 9; Rec., 10), and the same had been waived by answering.

The motion of the defendant, now petitioner, for an instructed verdict in its favor and the objection of the defendant to the instruction for a directed verdict in favor of plaintiff perhaps raise the question of the legality of the paper, but both errors are now waived.

It thus appears that the court, upon the trial, having overruled the objection as to the void character of the paper, if it was made, on the motions for instructed verdicts, could do nothing less than direct a verdict for plaintiff, but all errors as to proceedings and rulings

and exceptions taken on the trial are now waived by the petitioner. The only point now urged was presented, if at all, to the lower court upon the trial; it could not have been argued on the demurrer to the third defense, which asserted a defense of failure of consideration, but was inconsistent with a claim of the void character of the paper. The lower court ruled on the point, if at all, on the trial. The defendant excepted to the ruling and now waives and abandons the error claimed, but asks to have the same point reviewed on account of a preliminary ruling in the case which does not raise the point, and as to which no exception was saved.

The petitioner now contends in its brief that the point of the void character of the paper was raised upon the argument upon the demurrer but, even if that be so, the court's ruling upon the motion to strike, as well as upon the demurrer, if it involved the point, appears to be wholly immaterial, since the same point could have been raised on the trial.

But since it further appears that the exception to the court's ruling upon the trial upon that very point has now been waived, it follows that the very same ruling made prior to that time before the trial must be considered as waived, as it was immaterial.

By waiving the error assigned that the verdict as directed by the court was contrary to the evidence, which is error Number 9 (Printed Rec., 63; Rec., 69), it follows that it is now admitted by the petitioner, then defendant, that the evidence justified the verdict and the judgment.

We make this preliminary statement to show that there is nothing for this court to pass upon, and that the writ of certiorari has presumably been granted upon the record on account of the unnecessary ruling in the opinion of the Circuit Court of Appeals to the effect that an exception entered on the record is necessary to the review of a ruling sustaining a demurrer to a plea or statement of defense, although it does appear that that ruling is wholly immaterial, when the record is examined.

I.

SECTION 8 OF ARTICLE VII OF THE CONSTITUTION OF THE STATE OF COLORADO, AND SECTION 2342 OF THE REVISED STATUTES OF COLORADO, AUTHORIZED THE BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER TO ISSUE NEGOTIABLE CERTIFICATES OF INDEBTEDNESS FOR VOTING MACHINES; THE CERTIFICATE AND COUPON HERE SUED UPON WERE PROPERLY ISSUED AS NEGOTIABLE PAPER, AND TO THEM IN THE HANDS OF A BONA FIDE INDORSEE FOR VALUE BEFORE MATURITY THERE IS NO DEFENSE.

Passing for the present the question whether under the rulings of this court the order sustaining the demurrer to the third defense pleaded, which order did not eventuate in a judgment, is reviewable without an exception taken and reserved on the record; and passing likewise the point whether the matter now claimed was presented to the lower court on the argument of that demurrer, we proceed to the merits of the controversy here, which is one purely of law. For, if the power was given the petitioner to issue this paper, negotiable in form, all other questions are immaterial and the verdict and judgment must stand.

Assuming that all questions of practice were out of the case, the only error upon which the petitioner predicates its argument for reversal is the overruling by the trial court of the demurrer to the third defense. That defense was one of failure of consideration, and nothing more. The petitioner claims only that that defense of failure of consideration raised the legal issue of whether the certificate sued upon was in fact, as well as in form, negotiable; and that that issue raised necessarily the question of the power of the petitioner to issue a negotiable certificate of indebtedness.

Assuming, then, that all of the questions raised by the demurrer to the third defense are properly before this court—and the petitioner could not, and does not, claim that any other questions can be passed upon here—there are involved two ultimate legal questions in respect of the certificate upon which suit was brought:

1. Was the petitioner authorized by the law of Colorado to issue negotiable certificates of indebtedness?

2. Assuming that it did have that power, was the certificate here sued upon in form a negotiable instrument?

We do not apprehend that it will be denied that if these two queries be answered in the affirmative, the respondent's right to recover will have been conclusively established, as will, of course, the correctness of the judgment of the lower court. For in such a case, failure of consideration—the sole ground relied upon in the third defense—would furnish no defense to an action. It may be well to remark parenthetically at this juncture that not only did the third defense not proceed upon the theory that the respondent was not a bona fide holder in due course, but the respondent proved affirmatively that it was a bona fide holder in due course. That question is no longer open, nor does the petitioner claim it to be.

That in our statement of the ultimate legal questions which the petitioner claims are involved herein we have given the petitioner the benefit of every doubt is apparent from a comparison of our statement with that found in the petitioner's brief. Thus, at page 6, counsel say:

> "The third defense was sufficient in law solely and only upon the theory that the certificate of indebtedness sued upon was not negotiable. Whether the certificate was negotiable depended *solely and exclusively upon the question of the power and authority of the Board of County Commissioners to issue a negotiable certificate of indebtedness* under the laws of the state of Colorado. *If the law gave said*

Board the power to issue a negotiable certificate of indebtedness, the third defense was not sufficient in law."

The question of the *power,* therefore, of the petitioner to issue a negotiable certificate of indebtedness is the question attempted to be raised by the petitioner; as a practical matter, that is the only question in the case—assuming it to have been properly brought here—for the other question which we have suggested, namely as to whether the certificate was negotiable in form, is answered equally unequivocally by the admission of counsel and the most cursory examination of the instrument itself.

But first as to the question of power.

The power of the Board to purchase voting machines is admitted in petitioner's brief, at page 43. The pleadings in the case nowhere deny the making and issuance of the certificate by the Board, and it is conceded by the petitioner on page 43 of its brief that the defendant is the governing body of the city and county of Denver in its capacity as a county, and that the certificate was issued by the defendant. The second and third defenses affirmatively pleaded the making of a contract by the defendant for these machines and the issuance of the paper in payment therefor.

It is conceded by the petitioner that the language of the Eighth Section of the Constitution of Colorado, and of Section 2342 of the Revised Statutes of Colorado of 1908, conferred power upon the petitioner to issue bonds. That language is as follows:

> "When the governing body of any * * * city and county * * * shall adopt and purchase * * * voting machines, such governing body may provide for the payment therefor by the issuance *of interest-bearing bonds, certificates of indebtedness, or other obligation,* which shall be a charge upon such * * *

> city and county * * *; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, but shall not be issued or sold at less than par."

Passing, for the moment, the distinction attempted to be drawn by the petitioner between bonds and the obligations actually issued, it is indisputable that *the power so conferred upon the petitioner to issue bonds was the power to issue negotiable bonds.* On that point the authorities are unmistakable, and the petitioner virtually concedes (at page 48 of its brief) that this is the law.

In *D'Esterre* v. *City of Brooklyn* (1898), 90 Fed., 586, it was held that a statute authorizing the issuance of bonds by municipalities will be construed as giving power to make them negotiable in the absence of provisions clearly showing a contrary intention. In that case the court said, at page 590:

> "An examination of the enabling statutes would illustrate that power to issue negotiable bonds is seldom, if ever negatived. This condition exists for the very sufficient reason that such bonds are intended to pass by delivery or by endorsement, in order to give them marketable value. The bonds of a municipality payable, as are these in question, after a long interval of time, would meet neither with ready sale nor the most valuable return to the town if they were subject to all of the possible defenses to which non-negotiable paper is exposed. The statute under consideration authorized a general issue of bonds and in the absence of restrictive words, the power would be implied to give them a negotiable form."

In *Ashley* v. *Board of Supervisors* (1893), 60 Fed., 55, the Circuit Court of Appeals for the Sixth Circuit had the same question under consideration. Legislative authority had been conferred upon a municipal corporation to issue bonds, but nothing was said as to the nego-

tiability of the bonds so to be issued. As to this the court said, at page 67:

> "It is further objected that the act of 1885 did not authorize the issue of bonds negotiable in form, the contention being that that requires express authority whereas this statute authorizes the issue of bonds without more; and the cases of *Merrill* v. *Monticello*, 138 U. S., 673, and *Brenham* v. *Bank*, 144 U. S., 173, are cited, in which it was held that a statute authorizing a municipality to borrow money did not by implication carry with that authority the power to issue negotiable bonds. In the present case the power is given to issue bonds running for a long period of time and bearing interest, and it appears on the face of the act that the bonds might be put upon the market and sold. We cannot doubt that negotiable bonds were intended. The same question was made in the Cadillac case above referred to; and it was held by this court upon a statute of like kind, though not quite so clear in its implication, that the power to issue bonds must be taken to authorize bonds in the usual form of such well-known commercial obligations, and that the doctrine of *Brenham* v. *Bank*, did not apply."

In *City of Cadillac* v. *Woonsocket Inst. for Savings* (1893), 58 Fed., 935, the Circuit Court of Appeals for the Sixth Circuit, composed of Mr. Justice Brown and Judges Taft and Lurton, held that statutory power to issue bonds includes the power to make the bonds negotiable. In that case Judge Lurton, later Mr. Justice Lurton, in delivering the opinion of the court, said, at page 937:

> "The first defense interposed is that the City of Cadillac had no power to issue negotiable bonds, and that the holder of these bonds is not therefore protected against any defense which the city can make."

After quoting the provisions of the statute under which the bonds purported to have been issued, and which provide merely that "the bonds of the city may be issued

bearing a legal rate of interest," the court continued, at page 937:

> "This act clearly authorizes the issuance of 'bonds' bearing a legal rate of interest for any loans lawfully made. * * * That this contemplates, and by necessary implication authorizes the issue of negotiable bonds, we have no doubt. The general power to issue bonds must be taken to authorize bonds in the usual form of such well-known commercial obligations. That usual form embodies a contract and obligation negotiable in its terms. The case of *Brenham* v. *Bank*, 144 U. S., 173, has no bearing upon this question. Nothing more is there decided than that an act empowering a city to 'borrow for general purposes not exceeding $15,000 on the credit of the city,' did not authorize the issuance of negotiable obligations for the money so borrowed. Here the power to issue obligations by necessary implication in the usual commercial form of bonds, is expressly given. But one meaning can be fairly deduced from the terms of the act. The question now presented was not discussed in the Brenham case, and we have no doubt whatever as to the conclusion we have announced."

The Supreme Court of the United States in the case of *County of Carter* v. *Sinton* (1887), 120 U. S., 517, 30 L. Ed., 701, reached the same conclusion.

In that case suit was brought to recover on certain bonds and interest coupons issued by the County of Carter, pursuant to an act authorizing the County of Carter to subscribe $75,000 to the stock of a certain railroad company, and "to issue its bonds to raise the money to pay therefor." The bonds were issued negotiable in form and passed into the hands of *bona fide* purchasers for value before maturity. It was objected on behalf of the county that the county was without power to issue negotiable bonds which, in the hands of innocent holders, would be free from the equitable defenses which

would be good as between the original parties. As to this the court said, at page 703 (of Lawyers' Edition):

> "It is no doubt true that without sufficient legisaltive authority a municipality cannot issue commercial paper which will be free from equitable defenses in the hands of innocent holders; but in our opinion that authority was given here. The County of Carter was authorized to borrow money and to issue its bonds therefor to pay its subscription to the stock of the railroad company. *This all agree was sufficient authority to issue bonds which were negotiable,* and the averments in the declaration are that the bonds which were in fact issued had that character."

To the same effect are

Gelpcke v. *Dubuque* (1864), 1 Wall., 175.
Gunnison v. *Rollins* (1899), 173 U. S., 255.

Judge Dillon on Municipal Corporations, 5th Ed., says at sec. 882:

> "If express power be conferred upon a municipality to issue bonds bearing interest, this contemplates, and by necessary or reasonable implication authorizes the issue of negotiable bonds. A non-negotiable bond is no more serviceable to the holder than the ordinary warrant—the usual voucher issued in liquidation of ordinary expenditures of the municipality—and if a bond is to be endowed with an enlarged value, the only manner in which it can be done is to give it negotiability so as to impart to it the quality of commercial paper, and thereby cut off equities in the hands of innocent purchasers for value. * * * The general power to issue bonds must be taken to authorize bonds in the usual form of such well-known commercial obligations. The usual form embodies a contract and obligation negotiable in its terms. Money may be borrowed by a city upon a non-negotiable instrument, but in order to obtain advantageous competition for the use of money, it must issue commercial paper. *Therefore, when power to issue bonds is expressly conferred, the municipality has of necessity or by fair construction the power to give to these bonds the usual commercial attributes of negotiability.*"

In support of this statement of the law the author cites, among others, the following cases:

Rathbone v. *Hopper*, 57 Kan., 240.
Vicksburg v. *Lombard*, 51 Miss., 111.
Lexington v. *Union Nat. Bank*, 75 Miss., 1.
Klamath Falls v. *Sachs*, 35 Ore., 325.
Austin v. *Nalle*, 85 Tex., 520.
Winston v. *Ft. Worth* (Tex. Civ. App.), 47 S. W., 740.
Jefferson v. *Jennings Banking, etc. Co.*, 35 Tex. Civ. App., 74.

It is equally beyond dispute that at the time the certificate here sued upon was issued—as well as now—the rule of law for which we have been contending prevailed both in the Federal Courts of the Eighth Circuit and in the state courts of Colorado.

The leading case in the Eighth Circuit is *West Plains Township* v. *Sage* (1895), 69 Fed. (C. C. A.), 943. In that case the municipality had been given power to issue bonds for certain designated purposes. Negotiable bonds were issued, reciting that they were issued for the purpose for which they were authorized, whereas they were in fact issued for an unauthorized purpose. The township sought to avail itself of this defense against a *bona fide* purchaser. Conceding that the defense would be good, except as against a *bona fide* purchaser, the question was squarely presented whether the bonds were negotiable. This, of course, raised the question of the power of the township, under the statutory authorization, to issue negotiable bonds. As to this the court said, at page 948:

> "The objection that the act under which these bonds were issued gave no authority to the township to issue negotiable bonds is, in our opinion, untenable. In the cases of *Merrill* v. *Monticello*, 138 U.

S., 673, 11 Sup. Ct., 441; *Hill* v. *Memphis*, 134 U. S., 198, 10 Sup. Ct., 562, and *Brenham* v. *Bank*, 144 U. S., 173, 12 Sup. Ct., 559, cited in support of this objection, and in the cases referred to in the opinions in those cases, none of the acts there under consideration authorized the municipal bodies to issue bonds at all; and the extent to which those decisions go is to hold that the power to issue negotiable bonds is not to be implied from the limited power to borrow money or to incur indebtedness. The act under consideration in this case authorized this township to 'issue new bonds,' without any restriction as to their negotiability. This grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. The usual—nay, it may almost be said the universal—form of such securities is that of a negotiable bond payable to bearer; and. in our opinion, it was bonds in this form, and in no other, that the legislature of Kansas had in mind and intended to give this township power to issue by this act."

So far as we have been able to discover, the doctrine of this case never has been questioned, and, on the contrary, the rule of law has been repeatedly reaffirmed and the case cited with approval, particularly by the Circuit Court of Appeals for the Eighth Circuit.

In *Geer* v. *Board of Comrs.* (1899), 97 Fed., 435, bonds were upheld in the hands of *bona fide* purchasers on the theory that they were negotiable, although the statutory authority provided merely for the issue of "bonds" without reference to their negotiability. That this question was a vital one in the case is apparent from Judge Caldwell's dissenting opinion, where he said—still adhering to his dissenting view in the *West Plains Township* case:

> "I dissent from the reasoning and conclusion of the court on the 'seventh defense' [which was a defense of want of consideration], and, in support of my dissent, refer to my dissenting opinion in *West*

Plains Tp. v. *Sage*, 69 Fed., 943, and the cases there cited."

Finally, in *Hughes Co.* v. *Livingston* (1900), 104 Fed., 306, even Judge Caldwell, who theretofore had dissented as in the *West Plains* case, seems to have come to regard the law as settled in accordance with the majority opinion in *West Plains Tp.* v. *Sage, supra.* In any event the Circuit Court of Appeals for the Eighth Circuit seems to have been unanimous in following the *West Plains* case. The power to issue bonds was held there without any discussion to be the power to issue negotiable bonds.

West Plains Township v. *Sage, supra,* was followed in *Howard* v. *Kiowa County* (1896), 73 Fed., 406, and in *Waite* v. *City of Vera Cruz* (1898), 89 Fed., 619. In the latter case the court said at page 633:

> "The statute under which the bonds in suit purport to have been issued authorized the defendant, upon conditions named therein, to issue bonds for the purpose of refunding that part of its indebtedness evidenced by bonds and warrants. *The authority thus given must be construed as one to issue negotiable bonds in the usual form."*

The same view of the question was taken by the Supreme Court of the United States when the case was carried there. (184 U. S., 302.)

Such, too, is the law of Colorado, as was held by the case of *City of Cripple Creek* v. *Adams* (1906), 36 Colo., 320. This case is important, not only as bearing directly on the point with which we are immediately concerned, but because of its marked similarity to the case at bar and the applicability here of the general principles it announces.

Pursuant to statutory authority to issue bonds the town of Cripple Creek issued certain negotiable bonds for the purpose of purchasing water rights. The bonds sued

upon had passed into the hands of bona fide purchasers, against whom the defense of failure of consideration was sought to be utilized. As to the contention that the failure of consideration for the bonds, by reason of the failure of the title to the water rights, in consideration of which they had been issued, was fatal to the bonds, the court said at page 326:

> "The town of Cripple Creek authorized the issuance of these bonds, stated the consideration upon which they were to be issued—that is, in payment of water rights—and stated how the bonds should be authenticated, in other words, by the ordinance pursuant to which the bonds were issued. The town of Cripple Creek authorized the issuance of the bonds and left to the Board of Trustees to determine the existence and sufficiency of the consideration for which the bonds should issue. It further told the public by this ordinance when it could put faith in the bonds—that is, when they should be authenticated by the signature of the Mayor, Clerk and Treasurer. The bonds, when issued, were an unconditional promise to pay a certain sum of money at a definite time. The coupons attached thereto were of like effect. The city had the power to issue them. Before the maturity of the bonds or coupons, they were purchased by plaintiff for a valuable consideration and without notice or knowledge of the infirmity therein.
>
> "Municipal bonds are clothed with all the attributes of negotiable or commercial paper, pass by delivery or endorsement, and are not subject to equities (where the power to issue them exists) in the hands of holder for value before due without notice. Dillon's Municipal Corporations, Vol. 1 (Third edition), Sec. 486. 'Such securities are made to raise money by their sale and this object would be defeated if they were subject to equities (where the power to issue exists) in the hands of bona fide holders.' "

The authority in Section 935 of Mills' Annotated Statutes of Colorado, for a county to issue coupon bonds of the county, does not provide for negotiable bonds. Nor

does the authority in Section 939, Mills' Annotated Statutes of Colorado, for a county to issue bonds for funding certain indebtedness mention negotiable bonds, yet negotiable bonds are issued thereunder. The bonds issued by the County of Gunnison, in the State of Colorado, issued under Section 6, Article XI of the Colorado Constitution, which does not mention negotiable bonds, but which merely authorizes the issuance of bonds, have been held by this court to be negotiable bonds.

Gunnison County v. *Rollins* (1899), 173 U. S., 255.

It is perfectly immaterial, therefore, whether the question we are discussing be treated as a question of the construction of a Colorado statute, upon which the decisions of the Supreme Court of Colorado should be controlling, even in this court; or, as has been more frequently said, as a question of general commercial law, in the decision of which the United States courts are unhampered by the rules of decision in the State courts. For, treated in either way, the answer is the same. The power given to a municipal corporation to issue bonds is the power to issue negotiable bonds.

But, says the petitioner at this point, the Board of Commissioners did not in fact exercise any power that may have been granted to it to issue negotiable bonds; what it actually issued was certificates of indebtedness; and whatever may have been its power in respect of bonds, it had no power to issue *negotiable certificates of indebtedness.* The narrow ground taken, then, is that while the Constitution and statute authorized the issuance of negotiable paper for the purpose of providing for or paying the purchase price of those machines, *so long as the name given to the paper issued was "bonds,"* they did not authorize the issuance of such negotiable

paper *if the name given to the paper* is that of *"certificates of indebtedness."*

To this contention of the petitioner there are, even aside from the manifest absurdity of the proposition on its face, several distinct answers, each of which is quite sufficient by itself.

First, the distinction sought to be drawn between bonds and certificates of indebtedness is wholly illusory. As a matter of fact, a bond in the ordinary form of municipal bonds is nothing more nor less than a certificate of indebtedness with a negotiable promise to pay. The certificate of indebtedness here in question is, as a matter of fact, a bond. The certificate recites the value received by the defendant and then contains a promise in one year to pay *to the order of* the Federal Ballot Machine Company the sum of $11,250 with interest on this sum from the date thereof at the rate of five per cent. per annum; the said interest being payable semi-annually as per two coupons thereto attached. The fact that the value received as the consideration for the issuance of the bond is expressed in the body of the bond and the fact that the paper is under seal, do not detract from its character as a negotiable bond. The cases are numerous in regard to such bonds:

Gelpcke v. *Dubuque* (1864), 1 Wall., 175.
Mercer County v. *Hackett* (1864), 1 Wall., 83.
Humboldt Tp. v. *Long* (1876), 92 U. S., 642.
Provident Life Company v. *Mercer County* (1898), 170 U. S., 593.

The above are all cases where the consideration is expressed in the bond and the bond is under seal.

Likewise in the *City of Cripple Creek* v. *Adams*, discussed *supra*, the bonds in question contained similar re-

citals. There, after the promise to pay, the bond recited as follows:

> "This bond is one of a series of bonds of like tenor and date which the said town of Cripple Creek has issued for the purpose of purchasing water rights necessary to supply said town with water in pursuance of an ordinance of said town of Cripple Creek duly and in due time, form and manner adopted, published and made a law of the said town; * * * and it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of this bond to render the same lawful and valid, have been properly done, happened and performed in regular and in due time, form and manner as provided by law. * * * In testimony whereof the said town of Cripple Creek has caused this bond to be sealed by its corporate seal, signed by its Mayor, attested by its Clerk and countersigned by its Treasurer, this tenth day of October, A. D. 1895."

It was held that the recitals in the bond did not affect the validity or the negotiability of the bonds or coupons attached thereto.

Technically the distinction between a bond and other promise to pay a certain sum of money on a certain day, is that the bond is a sealed instrument or what is called at the common law a specialty. This particular instrument sued upon is, of course, an instrument under seal. Therefore, the whole argument made by the petitioner amounts to this, that while it is conceded that the board had power to issue a negotiable bond and while the board did, as a matter of fact, issue a negotiable bond with coupons for interest attached, which are negotiable in form, nevertheless because the instrument was called "a certificate of indebtedness," the instrument must be declared to be one issued without authority, on the ground that while there does appear to be express authority to issue negotiable bonds there is no express authority to issue negotiable certificates of indebtedness. We submit

that such an argument is entitled to no consideration, for it makes the whole question depend on the mere name given to the paper.

Historically speaking, the term "certificate of indebtedness" or "certificate of loan" is and imports a negotiable instrument. And the courts themselves have declared substantially that a certificate of indebtedness is a bond in the sense that it is a negotiable obligation, provided it contains a promise to pay a sum certain at a time certain to the order of a person certain or to bearer made by a person certain (using person to include artificial persons).

In the case of *Amey* v. *The Mayor* (1861), 24 How., 364, certain obligations of Allegheny City, Pennsylvania, which were denominated "certificates of loan," came under consideration. The city was permitted by an act of the legislature to subscribe for stock of a railroad company to be paid for by certificates of loan. Later another act was passed, authorizing the city to increase its subscription upon the terms and conditions of the original subscription, provided no bond for the payment of the subscriptions should be issued of a less denomination than one hundred dollars; and the court held that this proviso was merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than one hundred dollars, and the word "bond" was held to mean "certificate of loan." The court in commenting upon this situation, said (page 370):

> "The subscriptions of the defendants were made under the acts of the 5th April, 1849, and that of the 14th of April, 1859. The first permitted a subscription of $200,000, to be paid for by 'certificates of loan.' The second permitted the increase of it, to an amount not exceeding the first, without, however, having altered the manner in which the corporate credit of the city was to be used for the payment of

the second subscription. We infer from the words of the act, and do not see how it can be otherwise, that it was to be paid for by the *same certificates of indebtedness* which the legislature had directed to be issued and used for the payment of the first subscription. The act is, 'that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the said Ohio and Pennsylvania Railroad Company to any amount not exceeding the subscription heretofore made by the said city, upon the terms and conditions prescribed in regard to said previous subscription; provided no bond for the payment of the subscription shall be issued of a less denomination than one hundred dollars.' This proviso is merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than $100; and the words 'no bond for the payment of the subscription shall be issued,' when considered in connection with the act authorizing the second subscription, that it should be made 'upon the same terms and conditions of the first' cannot be interpreted into a permission or direction of the legislature, that the city might use in payment for the stock any other legal or commercial instrument than '*certificates of loan.*' Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money, in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as '*certificates of loan,*' with certificates for interest attached, payable to the bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be presented for payment. But now, in their use, they are called bonds, with coupons for interest—a coupon bond—*coupon* being the interest payable separable from the certificate of loan, for the purpose of receiving it. But neither the instrument nor coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt.

"Such certificates of loan have been resorted to

for many years in the United States to raise money for internal improvements. They were as well known and used in Pennsylvania as elsewhere, and were permitted to be issued in that state, by just such enactments as those which authorized the city of Allegheny to subscribe to the capital stock of the Ohio and Pennsylvania Railroad Company. Such an issue was applicable to the subject matter of legislation. The city solicited the state to be allowed to make the subscriptions. It was the policy of the state to grant the application. The subscriptions were made under the act of the 5th April, 1849, and that of the 14th April, 1859. The first permits a subscription of $200,000 which was to be paid for by certificates of loan. The act of the 14th April, 1859, allowed the increase of the subscription to an amount not exceeding the first, upon the same terms and conditions. It was the understanding of the legislature, of the city, and of the railroad company, that the subscriptions were to be paid for by the corporate credit of the city by the issue of 'certificates of loan.' That appears from the act of 1849, authorizing it, before the subscription was in fact made. That act provides, in anticipation of its being done, that the certificates of loan which shall hereafter be issued by the city of Allegheny in payment of any subscription to the Ohio and Pennsylvania Railroad Company were to be exempt from all taxation, except for state purposes. The railroad company took from the city certificates of loan in payment of the subscriptions, sold them as such, and with the money built the road. Such a concurrence of contemporaneous action by all the parties interested in the subject matter of legislation proves that it was the intention of the legislature that the authority given to the city to make the subscriptions to the railroad company had been carried out just as it was meant to have been.

"We answer, therefore, that the several acts of assembly stated in the agreed case did confer authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise bonds with coupons, as was done, to pay for its first and second sub-

scriptions to the capital stock of the Ohio and Pennsylvania Railroad Company."

In the case of *Humboldt Tp.* v. *Long* (1876), 92 U. S., 642, an instrument of the tenor following:

"Be it remembered that Humboldt Township, in the County of Allen and State of Kansas, is indebted to the Fort Scott and Allen County Railroad Company, or bearer, in the sum of $1,000 lawful money of the United States, with interest at the rate of seven per cent. per annum, payable annually on the first days of June in each year, at the banking house of Gilman, Son & Co., in the City of New York, on the presentation and surrender of the respective interest coupons hereto annexed. The principal of this bond shall be due and payable on the thirty-first day of December, A. D. 1901, at the banking house of Gilman, Son & Co., in the City of New York. This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen Railroad, and for the construction of the same through said township, in pursuance of and in accordance with an act of the legislature of the State of Kansas, entitled 'An Act to enable municipal townships to subscribe for stock in any railroad, and provide for the payment of the same, approved February 25, A. D. 1870'; and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition, the faith of the aforesaid Humboldt Township, as also its property, revenue and resources, is pledged.

In testimony whereof, this bond has been signed by the chairman of the Board of County Commissioners of Allen County, Kan., and attested by the county clerk of said county, this twelfth day of October, 1871.

Z. WISNER,
Chairman County Commissioners.

Attest:
W. F. WAGGONER,
County Clerk."

was declared to be in terms a certificate of indebtedness, and to be negotiable.

In that case Mr. Justice Strong said with reference to the instruments in question:

> "They are *certificates of indebtedness* to the railroad company or bearer, each for $1,000."

In *Christie* v. *City of Duluth* (1901), 82 Minn., 202, 84 N. W. Rep., 754, the Supreme Court of Minnesota has declared that "a bond is one form of certificate of indebtedness." In that case the city was authorized

> "to provide for the payment of its debts and expenses; to borrow money on its credit for city purposes and to issue bonds therefor; to issue bonds in the place of and to supply means for paying maturing bonds, and to consolidate or fund the same: * * * Provided, however, that the certificates of indebtedness issued for the creation and maintenance of a permanent improvement revolving fund shall not be considered as a portion of the indebtedness of the city for the purposes of this section."

It was also provided by another section of the ordinance that bonds shall not be issued for any purpose to the amount of $100,000 or over without submission to the legal voters.

It was charged in the complaint that an issue of $99,000 permanent improvement revolving fund bonds had been authorized, that the city was proceeding to sell the same, and that such issue was in excess of the legal limit. The only reference in the enabling act to such a fund was that above quoted, to wit: "Provided, however, that the certificates of indebtedness issued for the creation and maintenance of a permanent improvement revolving fund shall not be considered as a portion of the indebtedness of the city for the purposes of this section." It was contended that, in the absence of a specific definition of such a fund, defining its scope and limitations, the charter provisions with reference thereto were void; and further that, if the enabling act authorized such a fund for the

purposes named in the charter, bonds could not be issued for such purposes, *but only certificates of indebtedness*—that form of obligation being the only evidence of indebtedness recognized by the enabling act; and the court said (page 203):

> "These objections do not seem to be very forcible. While the language might have been more explicit, there is no reasonable doubt as to its application. It refers to such local improvements as all cities are charged with by way of assessment of the cost upon all property benefited thereby. It is the plain intent of the act to permit cities to establish a revolving fund for the purpose of meeting the expenses of such improvements until funds are realized through the regular channel of assessment and collection. The term 'certificate of indebtedness,' as used in this connection, is equivalent to the term 'bond.' A bond is one form of certificate of indebtedness, and the provision wherein this term is used should be considered in connection with the power to issue bonds up to $100,000, found in the latter part of the section. If a 'certificate of indebtedness,' as employed in the act, refers to some special form of obligation different from a bond, the act is silent upon that subject, and, without reference to the subsequent provision referred to, the language would be indefinite and ineffectual for any purpose."

It would seem from these authorities that the term "certificate of indebtedness," unless limited by apt and express words, is to be taken as meaning a negotiable obligation.

Since, therefore, the petitioner had power to issue negotiable bonds; and since the certificates which it issued are in form and in substance negotiable bonds, it follows that petitioner's argument that the certificate here involved was issued without authority is without foundation. That at the time the certificates of indebtedness were issued the law of Colorado and of the Eighth Circuit—as well as the law obtaining in the Federal courts generally

—was as we have stated it, there can be no doubt; and it must be assumed, therefore, that the certificates were sold upon the strength of the existing rule of law. We submit that the certificate of indebtedness here involved is a bond, and that the petitioner in making the bond negotiable was acting in pursuance of the statutory authority, interpreted either in the light of authoritative judicial precedents or of commercial usage and common sense; and that therefore, the certificate was not issued without lawful authority.

The second answer, too, to the petitioner's contention is found in the words of the constitutional and statutory provision, upon which the authority to purchase voting machines and provide for the payment therefor was predicated. The constitution and the enabling statute provide that "bonds, certificates of indebtedness or other obligations" may be issued.

On the principle of *noscitur a sociis*, or what is very much the same thing, the principle of *ejusdem generis*, since it is conceded that the word "bonds" in this connection means negotiable bonds, it follows necessarily that the certificates of indebtedness authorized to be issued are negotiable certificates.

Endlich Interpretation of Statutes, Sec. 400, and cases cited.

We have seen that the interest-bearing bonds authorized by amended Section 8 of Article VII of the Constitution of Colorado are negotiable bonds, and consequently if the certificates of indebtedness there authorized are limited to the same general class as bonds, if they are interest bearing and are a charge upon the city and county of Denver and could have been sold in the open market for the purpose of procuring money with which to pay for voting machines, then they possess and are in-

tended to possess all the characteristics and attributes of negotiability which the bonds authorized were intended to possess.

Moreover, the remaining language of the provision bears out completely the idea that the certificates of indebtedness, as well as the bonds, should have the attributes of negotiability, at least if the governing body desired to give them those attributes. For instance, the certificates of indebtedness or other obligations may be made payable at any time, not exceeding ten years from their date, but "shall not be issued or sold at less than par." If by "certificates of indebtedness" nothing but ordinary municipal "warrants" had been meant, it would have been absurd, of course, to talk of not "selling" them "at less than par." Such warrants would be transferable or assignable, but not strictly the subject of sale; nor could the word "par" be applied to them with even approximate accuracy. "Par" is a technical expression, denoting the face value of bills of exchange, shares of stock or other *negotiable* or quasi-negotiable securities.

Finally, the petitioner's argument by which it seeks to show that the instrument here sued upon was issued without authority proceeds from an entirely unsound premise. The argument proceeds upon the theory that to hold that the petitioner had the authority to issue negotiable certificates of indebtedness would be to reach such a conclusion in the absence of any express authority to issue negotiable paper, and invokes the aid of the rule of law that "any doubt of the existence of such power ought to be determined against its existence." The difficulty with petitioner's argument is that it overlooks entirely the foundation of the rule which it seeks to invoke—which had its genesis in the desire of the courts to prevent abuse of power by municipal corporations.

That the argument does overlook the consideration we have just suggested is not unnatural, since it overlooks the fact that in this case *the petitioner actually was given the power to issue negotiable paper—in some form—to provide for the payment of voting machines.*

The theory upon which the general rule of construction for which the petitioner contends proceeds is that it will not be assumed, in the absence of a fairly clear expression by the legislature, that the legislature is willing to permit its agency, a subordinate municipal corporation, to issue negotiable securities many defenses to which, in the hands of innocent purchasers, will be cut off. In other words the rule is one of expediency, the courts refusing to presume the existence in a municipal corporation of power to issue negotiable securities in the absence of express or reasonably implied authority from the superior legislative body.

And it is to that point that the reasoning and language in all of the cases cited by the petitioner are addressed.

For instance, in *Brenham* v. *Bank* (1892), 144 U. S., 173, a case strongly relied upon by the petitioner, the court used the following language, quoted by the petitioner:

> "It is easy for the Legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds, and under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case."

The rule which the petitioner seeks to invoke here was clearly applicable in that case, for there there was *nowhere* anything conferring authority upon the City of Brenham to issue negotiable securities for general purposes (for which the bonds had been given). The question there was: Did the city have power to issue nego-

tiable securities for this purpose? And it was held that it did not, on the theory that if the legislature had desired to permit the city to issue negotiable securities and thus cut off equitable defenses thereto in the hands of bona fide purchasers that desire must be clearly expressed.

The reason for the rule is stated even more clearly by Judge Thayer in the quotation reproduced by the petitioner from *Coffin* v. *Board of County Commissioners* (1893), 57 Fed., 137:

> "Finally, it is proper to call attention to the rule of law which requires the authority of a municipal corporation to issue negotiable paper to be clearly made out and established, whenever the existence of such a power is called in question. A power of that nature will not be deduced from uncertain inferences, and can only be conferred by language which leaves no reasonable doubt of an intention to confer it."

The citation in support of petitioner's present contention of these cases and of the rule of law they reaffirm indicates clearly, as we have suggested, a complete failure to comprehend the reason of that rule of law. Obviously, as soon as it is made to appear, as in this case, that the legislature *has* actually and clearly conferred upon the municipality power to issue negotiable securities *for the very purpose in question*, the rule laid down by the cases cited by the petitioner ceases to have the slightest applicability. All that the courts have said is this: When there is any doubt as to whether the principal has given its agent the power to issue negotiable paper to provide for the payment of voting machines, we shall protect the principal by finding against the existence of that power; but when the principal has indicated its willingness that the agent shall exercise that power, our concern is at an end.

If it be true, therefore, that the petitioner had the power to issue negotiable bonds—a power which cannot be seriously questioned—this case is at once removed from the application of the rule relied upon. For, in such a case, the power *to issue negotiable paper*—which is the *only* power the courts have been reluctant to infer from uncertain legislative expression—is conclusively established. Moreover, the power thus established is the power to issue negotiable securities *for the precise purpose for which this certificate was issued.* That delegation of power discloses indisputably the legislative policy with reference to the power of the petitioner to buy voting machines and to provide for their payment by the issuance and sale of negotiable paper.

The legislature, having in mind the rule of law which construes "bonds" in such a case to mean "negotiable bonds" said to the petitioner: "You may buy voting machines and issue negotiable obligations to provide for their payment." That declaration settled the question of power. Then, as a mere detail, unconnected with the question of power—and rather by way of making unlimited than of limiting the form of negotiable obligations which might be utilized—the legislature said that they could be in the form of bonds, certificates of indebtedness *or other obligations.* Once it is shown that there was *any* power to issue negotiable paper, it seems so clear as to be not a proper subject for argument that the petitioner was vested with absolute discretion as to the form of the obligations which it should issue. Doubtless it could have issued non-negotiable paper if it had wished; and so could it issue negotiable paper if it wished. To it was given the choice; it was left unhampered by the legislature.

If in the statute no mention had been made of bonds,

and only "certificates of indebtedness or other obligations" had been specifically referred to, it still would have been open to argue with much plausibility that in view of the practical necessities which the legislature would be deemed to have had in mind in passing the enabling act, the power was given to issue *negotiable* obligations. And that argument we submit, would be entitled to prevail notwithstanding the necessity, in such a case, of rebutting the supposed presumption that a municipality has not the power to issue negotiable securities unless the intention to confer that power be clearly indicated. But in this case there is no such uncertainty. The legislature has completely satisfied the supposed presumption by giving power to issue *negotiable* bonds. The respondent's authority then reads:

> "may provide for the payment therefor by the issuance of *negotiable* interest-bearing bonds, certificates of indebtedness or other obligations, which shall be a charge upon such city and county. * * *"

As stated by the petitioner (Brief, p. 55), the hardship which the courts have attempted to prevent by indulging a presumption against the existence of the power to issue negotiable paper is

> "utterly to deprive taxpayers of a municipality of any defense against the collection of obligations, such as the certificate in question, although the consideration for the issuance of such an obligation has utterly failed."

Whether the legislature desires to do that, and thereby procure for the municipality the advantages which can be obtained only through the medium of negotiable paper, is a question of legislative policy. When, as here, the legislature has decided that question in the affirmative, and has said clearly that one form of negotiable paper, which will subject the taxpayers to the hardships portrayed by the petitioner, may be issued, the question

is answered. The municipality has, and is unmistakably intended to have, the power to issue negotiable obligations. And, of course, once that is conceded, it becomes immaterial so far as an argument based on the hardships that will follow the granting of the power to issue negotiable paper in any form is concerned, whether the obligations are called "bonds" or "certificates of indebtedness."

More than that, the petitioner's construction of the Eighth Section of Article VII of the Constitution of Colorado and of Section 2342 of the Revised Statutes of Colorado of 1908, which reproduces the exact words of the Constitution, cannot be justified from the words of the statute or the Constitution. Those words are:

> "When the governing body of any * * * city and county * * * shall adopt and purchase * * * voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such * * * city and county; * * * such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, *but shall not be issued or sold at less than par.*"

This provision contemplates the following matters:

1. That the interest-bearing paper may be issued to provide money to pay for machines, not alone that the interest bearing paper shall be issued directly to the seller of the machines in payment of the purchase price of machines.

2. That the paper may be long time paper bearing interest during the whole period, and shall either be itself payment or shall provide funds for payment.

3. That the paper shall have a definite maturity and not be paper payable on demand or when funds accrue,

i. e., not a warrant or a draft or order of one officer on another, nor a voucher.

4. That the paper issued shall be a general charge upon the city and county, not paper payable out of any particular fund or out of the taxes or revenues as they accrue.

5. That the interest-bearing paper may be issued or sold in the open market to provide funds.

6. That these provisions are all applied generally to the paper issued, whether it be bonds, certificates of indebtedness or other obligations.

The necessity for the issuance of negotiable interest bearing obligations is so overwhelming from the very provisions of the act itself, that there can be no reasonable doubt as to the existence of the power.

If, notwithstanding the considerations we have suggested, there remained the slightest doubt as to the power of the petitioner to issue the negotiable certificate sued on, it might be pertinent for us to call attention to certain observations made by Judge Dillon in his work on Municipal Corporations. Thus at Section 897 (5th edition) the learned author says:

> "In municipal bond cases the Supreme Court of the United States has rejected, when necessary to protect the bona fide holders of such securities, narrow and rigid constructions of statutes and charters authorizing the creation of such debts. * * * The result, moreover, has been of incalculable value to municipalities in general by establishing upon a firm foundation the credit of their securities issued for immediate permanent improvements, enabling them thereby to obtain money for these purposes on a lower interest basis than would otherwise have been possible; and for this the country at large is under lasting obligations to the wisdom, courage, foresight and sense of justice of the Supreme Court of the United States."

At Section 886 he says:

> "The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint against repudiation, even when made on legal grounds deemed solid by the state courts as well as by the municipalities. That such securities have any general credit and marketable value left is largely due to the course of adjudication in respect thereto by the Supreme Court, and the reliance which is felt by the public that it will stand firmly by the doctrines equally just to the investor and beneficial to municipalities in general and to the public which it has so frequently asserted."

Finally, in a note to the text quoted (page 1402) he uses language which, even more than the foregoing quotations is peculiarly applicable to the facts of the case at bar. He says:

> "If the Supreme Court cannot be said to have adopted liberal constructions of statutes authorizing the issue of bonds, it may be indisputably affirmed that it has in such cases held the municipality firmly to the practical construction it had put upon the enabling acts, in cases where the acts fairly admitted of the construction adopted by the municipality, and the rights of bona fide holders were involved."

Here, then, was an enabling act whose ultimate purpose was to make it possible for municipalities to procure voting machines. To accomplish that end the legislature gave authority to provide, in a practicable way, for the payment of the machines by the issuance of the municipality's negotiable obligations. Not only would the purpose of the act have been seriously hampered, if not completely frustrated, by any other construction of the power conferred by making it difficult if not impossible to find takers for non-negotiable paper, *but the petitioner itself construed the act as conferring upon it the power to issue negotiable paper.*

In *Thomas* v. *Grand Junction* (1899), 13 Colo. App., 80, in construing liberally a statute authorizing the purchase of water works the court said at page 85:

> "The primary object of the statute was to permit the inhabitants of towns and cities to secure an adequate supply of pure water. * * * This being the case it is to be presumed *that the legislature desired to invest the people, who were themselves to bear the burdens of the expense, with every power necessary to supply this imperative want.*"

And again at page 87:

> "We think it to have been clearly the intent of the legislature to vest in the authorities of cities and towns, entire discretion as to the use of any and all of the means specified in the statute to supply this paramount necessity. Such a conclusion is not in contravention of any statutory or constitutional provision, but is in accord with the general tenor, purpose and interest of the legislature in its enactments in reference to and for the government of towns and cities. *The whole spirit of the law is so far as possible to permit under reasonable restriction the privilege of self-government.*"

It follows then necessarily that the defendant board had the power to issue as a negotiable instrument the instrument sued upon. That instrument is negotiable in form and therefore, it appearing beyond all question that the instrument was issued by proper authority and was before maturity for value endorsed and sold in due course of business in good faith to the respondent, who became and has ever since remained the *bona fide* holder thereof, there was no defense to this action. The court properly held that the third statement of defense stated no defense whatever, and that judgment was properly given for the plaintiff.

II.

THE ONLY QUESTION RAISED BY THE THIRD DEFENSE WAS THE NEGOTIABILITY OF THE CERTIFICATE SUED UPON. THE ORIGINAL VALIDITY OF THE CERTIFICATE WAS NOT CALLED IN QUESTION EITHER THERE OR ELSEWHERE IN DEFENDANT'S ANSWER. MOREOVER, EVEN IF THE POINT HAD BEEN RAISED BELOW, IT IS NOT TENABLE.

Under the "Third Point" of its brief in this court the petitioner argues that it was without authority to issue negotiable certificates of indebtedness; that the certificate here sued upon was negotiable in form; and that, therefore, the certificate is absolutely void.

To this argument there are two complete answers:

1. The question of the validity of the certificate in suit, assuming that it was raised at all in the trial court, was raised by the motion to direct a verdict and not by the third defense. Since the sustaining of the demurrer to the third defense is the only error attempted to be presented for the consideration of this court, it is apparent that the question of the validity of the certificate—as distinguished from the question of its negotiability—has no standing in this court.

2. The argument is absolutely fallacious, as a proposition of law.

As already has been pointed out the only question which was raised in the court below which the petitioner even attempted to raise either in the Circuit Court of Appeals or in this court was the one presented by the demurrer to the third defense. Whether even that question has been saved in such a way that it presents anything for the consideration of this court we shall not discuss here, but shall leave for a subsequent division of

our argument. But, even if the petitioner's entire contention were admitted as to the sufficiency of the record to present for review here the order sustaining the demurrer to the third defense, that question is the *only* one which the petitioner claims to have brought here.

With that fact in mind, we pass to a consideration of the contention that the certificate upon which suit was brought was not merely non-negotiable, *but was absolutely void.*

This contention proceeds necessarily and admittedly from the assumption that the petitioner was without power to issue negotiable certificates of indebtedness. If, therefore, it should be held—as in our opinion it must be—that the petitioner did have the power to issue as a negotiable instrument the certificate sued on, then of course, the question which counsel have argued under their "third point" can never arise. In such an event the validity of the paper and its negotiability are established, and the petitioner's case falls.

But, the petitioner contends, if it once be held that it was without power to issue the certificate as a negotiable certificate, the certificate must be held to have been absolutely void in its inception.

The primary difficulty with this point is, as we have suggested, that it is not properly brought to this court. The only questions saved were the questions raised by the plaintiff's demurrer to the defendant's third defense; and that demurrer raised, at the most, the question of the negotiability—and so, as counsel say, the power to issue negotiable paper—of the certificate. The third defense was a defense of failure of consideration, premised, as counsel have persistently claimed, on the theory, that the petitioner was without power to issue negotiable certificates of indebtedness and that, therefore, the cer-

tificate sued upon was in fact not negotiable. Upon that theory, and that theory alone, were the allegations of fact in the third defense tending to show failure of consideration, material. If that theory of the lack of legal authority to issue a negotiable certificate were sound, then the defense would be entitled to offer evidence of failure of consideration—a defense which, if established, would bar a recovery if the instruments were non-negotiable, but which would be unavailing if the instruments were negotiable (since they had passed into the hands of a bona fide purchaser).

The way, and the only way, in which prior to the trial the question of the *validity* of the certificates could have been raised *was by demurrer to the complaint.* Every fact having any bearing on the authority of the defendant to issue a negotiable certificate of indebtedness was of record as soon as the complaint was filed. The authority pursuant to which the certificate purported to have been issued was a statute of the State of Colorado, which of course did not have to be pleaded; while the certificate, showing that the instrument issued and sued upon was negotiable in form, was set out *in haec verba* in the complaint. Consequently, the complaint itself presented squarely—or would have, if demurred to—the question which the petitioner now seeks to raise, but to which no reference was made in the trial court. It was a purely legal issue as to which the allegations in the third defense were wholly immaterial.

If the defendant desired to test the sufficiency of the complaint, he should have done it by a demurrer; but the theory of the third defense was that the certificate of indebtedness was good as issued but that it was not, because it could not be, negotiable in fact, and that therefore it was a defense to the action that the considera-

tion had failed. The defendant did not demur because it did not then assert the rule of law now asserted.

This is evidently what the Circuit Court of Appeals means in the doubt it suggests as to whether the question of the void character of the paper arises under the third defense.

Now since the sole error argued in this court is the ruling of the court upon the demurrer to the third statement of defense, it follows that the petitioner has not raised in this court the question which it thinks it is entitled to raise.

But the defense suggested is not only not raised but is negatived by the third defense; it is also negatived and therefore not raised by the first and second defenses. The first defense denies that the plaintiff is the owner or transferee of the paper. This defense admits the validity of the paper but traverses merely the allegation of its transfer. The second defense admits the validity of the paper but pleads first plaintiff's non-ownership in fact, and the ownership of the payee, thus denying the transfer, and then attempts to plead failure of consideration. Thus it appears that the issues actually joined, taken with the failure to demur to the complaint, show that the contention now made is an afterthought.

The difficulty with the petitioner's case is very plain, and it all arises from a change in legal position between the trial in the lower court and the hearing in the Circuit Court of Appeals.

The petitioner now asserts the law to be that if the Board had the conceded power to issue non-negotiable certificates and instead thereof issued negotiable certificates, the paper is absolutely void, citing *Mayor* v. *Ray*, 19 Wall., 468; *Merrill* v. *Monticello*, 138 U. S., 673; *Hedges* v. *Dixon Co.*, 150 U. S., 182; *Swanson* v. *Ottumwa*, 131

Iowa, 547. This question, as we have shown, could be raised upon demurrer to the complaint.

But petitioner's position when it made its motion to strike, and pleaded its defenses was, as shown by its pleadings, that if the Board had the conceded power to issue non-negotiable certificates and instead thereof issued negotiable certificates, the paper is not void but is simply non-negotiable. It is needless to say that the latter proposition is the law.

When confronted with the complaint, the petitioner, recognizing the rule of law it then believed in, did not demur. Hence the petitioner's motion to strike out the word negotiable and its refusal to demur. It there recognized that the paper was not void.

When the defendant was required to plead, after its motion to strike was overruled, it pleaded, in accordance with its view of the law that the paper was simply non-negotiable but not void, three defenses. Each of the three is predicated necessarily upon the legal proposition that the paper had *prima facie* validity and *prima facie,* a consideration, the first defense recognizing its validity and negotiability, but denying plaintiff's ownership; the second recognizing its validity, but denying both its negotiability and plaintiff's ownership; and the third recognizing its validity but denying its negotiability by pleading facts which would have constituted a defense to non-negotiable paper, but not to negotiable paper, namely, failure of consideration.

The second statement of defense is therefore double. It contains two separate and distinct defenses and under the common law system it would have been demurrable for duplicity. It alleges first that the plaintiff is not the real party in interest, because it does not really own the paper. This is an argumentative denial of the plain-

tiff's *bona fide* ownership for value, and constitutes a complete defense in itself. The second defense then asserts failure of consideration. This, too, independently of the truth of the allegations of non-ownership, is a defense if the paper was in law or in fact non-negotiable. In other words, if the paper was non-negotiable in law or in fact the first part of the second defense was wholly unnecessary; but if it was negotiable, the second part of the defense was wholly unavailing, and it became necessary for the defendant to fall back upon the allegations of plaintiff's non-ownership. Therefore the second defense was a composite defense, embodying both the first and third defenses, and every particle of evidence admissible under either the first or third defense was equally admissible under the second defense. Strike out both the first and third defenses and the issues remained the same; it was yet open to the defendant to prove either defense: (1) that the endorsement and transfer of the paper to the plaintiff were colorable and not *bona fide*, and that the Federal Ballot Machine Company still owned the paper; and (2) that the paper was by law non-negotiable and therefore subject, even in the hands of a *bona fide* purchaser for value before maturity, to the defense of failure of consideration.

It is apparent, therefore, that neither in the third defense—which is the only one with which this court is concerned—nor in either of the others was the question of the *validity* of the paper raised. The only issues raised by the defenses were the ownership of the paper by the plaintiff, and the negotiable character of the paper.

Then the defendant went to trial on the above two defenses, both clearly defined, but it offered no evidence in support of either. On the contrary both parties, by

asking for a directed verdict, submitted the question of plaintiff's ownership of the paper to the court, which directed a verdict for the plaintiff. The presumption is that neither defense was pleaded in good faith, for the record overwhelmingly shows the untruth of the first, and the defendant offered no evidence to prove the second.

Thereupon, when the case was taken to the Circuit Court of Appeals, the defendant switched from the untenable positions taken in the trial court that the plaintiff was not the owner of the paper, and that the consideration had failed, to the still more clearly untenable one that the paper was absolutely void and could not be the basis of recovery in any event, regardless of the sufficiency of the consideration.

Having failed to demur to the plaintiff's complaint and thus raise the question, the defendant took only one step by which it can even be argued that it raised the legal question of the validity of the certificate in the trial court. That was by its motion to direct a verdict. And as to this the Circuit Court of Appeals was right in its doubt whether the point of the void character of the paper was ever suggested or argued to the lower court.

But even if it be admitted that the question was properly raised in the trial court, that fact can avail the petitioner nothing now, for the very obvious reason that by the specification of errors the error, if any, in refusing to direct a verdict for the defendant was waived, and the only questions saved were those presented by the demurrer to the third defense.

If the fourth, fifth and tenth errors, which are alone argued, are consulted, it will be seen that not one of them raises the question of the void character of the paper. The question does not arise on demurrer to the third defense for that admits the validity of the paper as we have

seen. The fifth error simply assigns the ruling that the paper was negotiable as error, not that the paper was void. The tenth error is too general.

The errors assigned in the Circuit Court of Appeals are:

First. That the court erred in denying defendant's motion to strike.

Second. That the court erred in overruling defendant's motion to strike out the allegation as to protest of the certificate.

Third. That the court erred in overruling defendant's motion to strike out the allegation as to protest of the coupons.

Fourth. That the court erred in sustaining the demurrer of the plaintiff to the third defense.

Fifth. That the court erred in ruling that the instruments sued on in the complaint were negotiable.

Sixth. That the court erred in overruling defendant's motion for a non-suit.

Seventh. That the court erred in overruling defendant's motion for a directed verdict.

Eighth. That the court erred in granting plaintiff's motion for a directed verdict.

Ninth. That the verdict was contrary to the evidence.

Tenth. That the judgment is contrary to the law.

Every one of these errors, except the fourth, fifth and tenth, is waived upon this argument in this court. The fifth error evidently refers to the ruling upon the demurrer. It therefore follows that the ruling upon the very point now urged made by the trial court upon the trial of the cause, where the question, according to petitioner's own claim, was raised and passed upon, has been waived.

However, clear as it is that the question, even if raised in the trial court, has not been preserved for the consideration of this court, it is not necessary to rely in our opposition to the contention, on technical grounds or questions of practice. The contention is unsound as a proposition of law. In fact the suggestion is so obviously without merit that, except for the diversified holdings of the courts of one State on the question, we should hesitate to argue it seriously or at any length.

As we have suggested, the question here under consideration can in no event arise except in the event of a holding that the petitioner was without power to issue negotiable certificates of indebtedness.

In this connection counsel for petitioner say in their brief (page 55):

> "It is, of course, well settled that if a municipality issues bonds or other obligations, negotiable in form, when no power has been conferred to utter negotiable instruments, the securities are void, and no recovery can be had on them as non-negotiable instruments."

In support of this astounding but "well-settled" rule of law, four cases are cited, three of which were decided by the Supreme Court of the United States and one by the Supreme Court of Iowa. To admit the possibility of counsel's having been ingenuous in citing, in support of their statement, the three cases decided by this court, would be to insult counsel's intelligence. Nor do we feel justified in wasting the court's time in discussing or analyzing the cases cited—for no analysis is required to demonstrate that the cases not only do not hold or intimate anything that justifies their use in this connection, but the inferences to be drawn from the cases tend in exactly the opposite direction.

If further evidence of counsel's disingenuousness were

required, it is readily found in their statement that the law is "of course, well settled," on that question. In view of the exhaustive investigation of the law which the petitioner's brief discloses, it is inconceivable that counsel did not know that the statement just made was a misstatement.

True it is, that the case of *Swanson* v. *City of Ottumwa* (1906), 131 Ia., 547, seems to support the proposition advanced by the petitioner; and that while other cases in Iowa have held differently, the Swanson case probably must be taken to state correctly the rule prevailing in that jurisdiction. But admitting that, we submit that the Iowa case is opposed both by every principle of law and logic and by the law of every other jurisdiction. And even in the Swanson case language is used which would save the certificates here in question from the damning operation of the rule. Thus the court said, arguendo:

> "Doubtless there are many cases, upon warrants negotiable in form, wherein recovery has been allowed; but such warrants are not in fact negotiable, and words of negotiability are, in such cases, clearly surplusage."

If in the case at bar the petitioner had no power to issue negotiable certificates then, of course, the words of negotiability are surplusage and the certificates may be treated as non-negotiable.

The basic fallacy in the Swanson case is in failing to discriminate between want of power to issue either negotiable or non-negotiable paper for a given purpose and want of power to issue negotiable paper merely. In the first case—which was the case in the authorities relied upon by the court—it is, of course, true that paper negotiable in form is absolutely void, *not because it was issued negotiable in form but because it could not lawfully have been issued in any form, negotiable or non-nego-*

tiable. In the second case the power to issue obligations being given, the obligations issued will be treated as good, but not as negotiable, obligations.

The distinction is pointed out clearly by Judge Dillon, who seems not to agree with the petitioner as to which way the law is "well-settled." In the Fifth Edition of his work on Municipal Corporations (Vol. I, page 531, note), in commenting on the *Swanson* case, he says:

> "If it is to be understood that if the bonds had not contained words of negotiability they would have been valid and recovery might be had thereon, but because, and only because, they are made negotiable in form they are wholly void, and no recovery can be had upon them, although the city has on the merits no defense thereto, it asserts a doctrine which we believe to be unsound, and one which is not necessary in the case supposed to protect the municipality, and which is manifestly unjust to the holder of such instruments. Such a doctrine is contrary to what is decided or declared in many cases, and one which we think will not obtain general judicial sanction. In a previous case the Supreme Court of Iowa laid down the true rule as follows: 'Where a municipal corporation has the power to bind itself by written obligation without the power to make the same negotiable, and it executes its written obligation making the same negotiable in form, it would not be void. It would result only that the instrument would not in fact be negotiable, and would lack the characteristics with which actual negotiability would clothe it.' *Sioux City* v. *Weare,* 59 Iowa, 95. * * * *A different rule would or might apply where there was no authority to create the debt or to issue any instrument whatever to evidence it.*"

In a note on page 543 of the same volume, Judge Dillon gives further expression to his view on the same question in the following language:

> "If the transaction is *infra vires* and the only excess of power is making the paper negotiable in form, the action may, we think be brought on the paper it-

self with the same effect as if it has been issued in non-negotiable form. See ante, Sec. 284. The cases are not uniform, and it has been held that though a debt be lawfully created, yet if for such debt *negotiable* bonds be issued (where there is no statutory authority to issue obligations in negotiable form), such bonds are void, and the holder cannot recover upon them as non-negotiable instruments. *Dodge* v. *Memphis*, 51 Fed. Rep., 165 (Thayer, J.). 'Suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received but has not in fact paid for because the securities issued in pretended payment were void.' Ib. This would be right if the bonds were void for want of any statutory authority *to create the debt* for which they were issued, but where there is such authority, and where, if the instrument is made in non-negotiable form, it would have been valid, why should the insertion of the words 'order' or 'bearer' make the same wholly void, and why may not the holder ignore the words of negotiability and sue upon the same with the same effect as if they were non-negotiable instruments, and thus open to all defenses which may exist whether the holder had notice thereof or not? See *Sioux City* v. *Weare*, 59 Iowa, 95; *Dively* v. *Cedar Falls*, 21 id., 565; *Clark* v. *Polk County*, 19 id., 248; *Pac. Imp. Co.* v. *Clarksdale*, 74 Fed., 528; ante, Sec. 284."

In *Pacific Improvement Co.* v. *City of Clarksdale* (1896), 74 Fed., 528, it was held that if a municipal corporation not authorized to issue negotiable bonds, does issue bonds, negotiable in form, in payment of a debt which it had power to contract, recovery may be had on such bonds, although they are, of course, subject, even in the hands of third parties, to equitable defenses.

There the Circuit Court of Appeals for the Fifth Circuit said at page 534:

"The debt or obligation due to the railway company at the time the settlement was made between the defendant and the railway company was still outstanding, and it was clearly the duty and right of

the defendant city to use such means in liquidation thereof as might be lawful in the discharge of any of its existing indebtedness. It was lawful, in the defendant, in settlement of its existing indebtedness, to give its promissory obligation to pay on such terms as the creditor might be willing to make. Conceding there was no power in the defendant to bind its constituency to the payment of commercial securities, as these bonds purport to be, it does not follow that—when such bonds were given in payment of a lawful debt, and the settlement of such debt is shown to have been the purpose for which the bonds were issued, and it is further shown that the mayor, being duly authorized by valid ordinances, signed and delivered the same to the creditor agreeing to take them—the defendant can escape the payment of the debt or obligation which is evidenced by such promises to pay, because, or on the ground that, the city authorities gave negotiable, instead of non-negotiable promises to pay to the creditor. On the contrary, when negotiable securities, instead of non-negotiable instruments, have been employed in settlement of lawful debts, the negotiable bonds so given have, when they were being sued upon, been treated, in a number of reported cases both in federal and state courts, as evidences of the debt, and on them, in the hands of third parties, recovery has been had against such defendant corporation."

In *Holmes* v. *City of Shreveport* (1887), 31 Fed., 113, the court said:

"But defendant contends that such bonds as these purport on their face to be, when issued for anything or to any person, are void. Conceding it to be true that the corporation had no authority to execute notes or bonds for any purpose, which would be entitled judicially to the protection of the law-merchant, does it follow that where the city's agents and all the parties to a *contract sanctioned by law agree to give and take such instruments* as would be so protected, that the instruments so given, are now held against defendant, are for all purposes void? Will the fact that those agents exceeded their power *only* in agreeing to give such instruments, or ex-

> ceeded their power *merely and only* in the selection of the means of evidencing the debt due the contractors, invalidate and extinguish the obligation lawfully incurred by the corporation? If no debt, sanctioned by the law, could be incurred for such public work as the grading and otherwise improving the city's streets then it would be a matter of no consequence to the city, or to the constituents of the corporation, what sort of evidences of the debt were issued to the persons doing the work, for the plea *ultra vires* would shield them against the debt. But the plea, if the debt is lawfully due and unpaid, will not protect the corporation against the payment of the debt because *of an irregularity or error* on the part of the city's agents *in giving commercial notes instead of non-commercial vouchers or warrants.* To give such an effect to the plea, whoever may be the parties to the contract, or whatever may be the irregularities in the instruments used to evidence a lawful debt, would be as unwarranted in good conscience as it would be novel in the administration of justice."

The Supreme Court of the United States was called upon to consider the same question in *Claiburne County* v. *Brooks* (1884), 111 U. S., 400. There Claiburne County, which had been given authority to build a court house, but had no express power to issue negotiable bonds, had issued bonds, negotiable in form, upon which suit was brought by a *bona fide* purchaser for value before maturity. The county offered evidence of payment, which it was conceded would have afforded a perfect defense against the original holder, and—in case the bond was non-negotiable—likewise against any subsequent holder. It became important, then, to determine whether the bond could be treated as having the attributes of negotiable paper, so as to cut off the defense of payment. The trial court charged the jury on the theory that the power to build a court house involved necessarily the power to issue negotiable paper to raise the money therefor, and

allowed a recovery. The Supreme Court held that the county was without authority to issue negotiable paper, and reversed the judgment and remanded the case for a new trial, thereby making it possible for the county to prove its defense of payment.

Not only did the court by remanding the case for a new trial negative any possible theory that the paper was *void,* but it said:

> "* * * the power to issue vouchers for payment is necessarily implied; but no power is given to issue bonds or other commercial paper having the privileges and exemptions accorded to that class of commercial securities. No such power is expressly given, and in our judgment no such power is necessarily implied. The document sued on in this case may very well have served the purpose of a voucher to show a stated account as between Sturm and the County, and may be of such form as to be assignable by indorsement, but it must always be liable, in whosesoever hands it may come, to be open for examination as to its validity, honesty and correctness."

If it had been *void* because issued negotiable instead of non-negotiable in form, there would have been no occasion to comment on its liability to inspection in the hands of subsequent holders.

In *Dorian* v. *City of Shreveport* (1886), 28 Fed., 287, the court came to the same conclusion. There it was said, at page 292:

> "Considering it established that the defendant was fully authorized * * * to acknowledge her indebtedness to R. & B. [the payees of the bonds], and recognizing her inability to issue for any purpose commercial paper—can the fact that the mayor and trustees (the city's agents) saw fit to issue paper purporting, as in this case, to be a commercial instrument, instead of a non-negotiable promise to pay, *invalidate* the obligation which the law imposed on the city * * *?"

In answering the query in the negative, the court said at page 295:

> "Under the authority presented in the cases cited, particularly in *Claiburne Co.* v. *Brooks*, we are warranted in treating the bonds held by Dorian 'as vouchers for money due—certificates of indebtedness for services rendered, or for property furnished, for the use of the city'—and Dorian, under the authorities following, stands in the shoes of the original payee."

We submit, therefore, that the point counsel urge under their Third Point, if raised at all in the trial court was raised not by the demurrer to the third defense, upon the ruling on which is predicated the sole error assigned but by a motion to direct a verdict, which has been waived; that, therefore, the question is not before this court; but that even if the question were properly here, the petitioner's contention must be overruled, since the sole effect of a holding that the Board of Commissioners of the City and County of Denver had no power to issue a negotiable certificate of indebtedness, would be not to make void the certificate here sued on, but merely to make it non-negotiable.

In such case no defense being proven to the paper on the trial, the verdict must stand, and the judgment is correct.

III.

THE CERTIFICATE OF INDEBTEDNESS WAS NEGOTIABLE IN FORM AND WAS NOT, AS CONTENDED BY THE PETITIONER, A NON-NEGOTIABLE WARRANT.

It is difficult to treat seriously the contention of the petitioner that the certificate sued upon was not in form a negotiable instrument. It argues through fifty-six pages of its brief to prove that the certificate is absolutely void because it is palpably negotiable in form, then in its fourth point it takes the position that this certificate of indebtedness is not negotiable in form but a mere warrant.

A negotiable instrument has been defined to have the following characteristics. It must contain either a direction or promise to pay a sum certain, on a day certain; it must have certainty as to parties and must be payable generally and at all events, out of funds either of the maker or of the person upon whom it is drawn.

It is said by petitioner that a bond is a new debt, or constitutes the evidence of a new debt, while a warrant or certificate of indebtedness is merely the evidence of a debt already contracted. This depends, as to a certificate of indebtedness, wholly upon its form. If it is in form a warrant it is, of course, a warrant. But if it is in form a negotiable instrument it is, whatever its consideration, in itself evidence of a debt, and the instrument itself creates the debt. The consideration might be an existing debt or a contemporaneously contracted debt. Thus a refunding bond is no less a bond because it shows a debt already contracted. Then the petitioner cites three quotations from 2 Dillon on Municipal Corporations, 5th Ed., 1284, 1273, 1295, and the language of *Watson* v. *City of Huron*, 97 Fed., 449, *Nashville* v. *Ray*, 19 Wall.,

468. But the language both of the text books and the opinions applies to warrants or to orders by one county officer on another or drafts by one county officer on another or to warrants issued containing no promise to pay, and the authorities, of course, have no application.

Prior to the year 1906 the only obligation for the payment of money expressly authorized by the constitution and statutes of Colorado other than the bonds authorized by constitutional and statutory provisions, was the county warrant which is specifically defined in the provisions of Section 801, Mills Annotated Statutes of Colorado (printed in the appendix hereto). This section provides substantially that all claims and demands held against a county shall be presented to the Board of County Commissioners for audit and allowance before an action in any court shall be maintainable, and that all such claims, when allowed, shall be paid by "a county warrant or order drawn by said Board on the county treasury, upon the proper fund in said treasury, for the amount of such claim."

The section further provides how such warrant shall be signed and attested, presented and countersigned. The section also provides that the general county fund shall be known and designated on the books of the county treasury as the "ordinary county revenue fund," and that the road fund shall be known and carried on the books as the "road purposes revenue fund." This section also provides that such warrants shall *be payable on demand,* shall be drawn and issued upon the county treasurer or against any funds in his hands, only when at the time of drawing and issuing the same there shall be sufficient moneys in the appropriate fund in the treasury to pay such warrant, and that whenever there are no moneys in the county treasury to the credit of the

proper fund to meet and defray the necessary expenses of the county, the Board of County Commissioners may provide that such warrants may be drawn and issued against and in anticipation of the collection of taxes already levied for the payment of such expenses to the extent of eighty per cent. of the total amount of the taxes levied. It is also provided in that section that such warrants shall show upon their face that they are payable solely from the fund upon which the same are drawn, and the taxes levied to form the same when collected, but not otherwise, and that such warrants shall be paid only by, through and from the fund drawn upon, and the collected and uncollected taxes levied, appropriated, collected or paid into the county treasury to create, constitute and form such fund. It is also provided in that section that such warrants shall not operate as a debt of the county and shall not be held to add to or increase the debt or indebtedness of the county.

Prior to the year 1906 such county warrants and the bonds issuable under Section 6 of Article XI of the Colorado constitution (printed in the appendix hereto) and Section 935 Mills Annotated Statutes of Colorado, and Section 934, Mills Annotated Statutes of Colorado (both sections printed in the appendix hereto), were the only evidences of indebtedness which counties could issue under express provisions of law. But in that year the provision as to voting machines was passed and adopted as a part of the constitution, as amended Section 8 of Article VII of the Constitution.

Now it is perfectly plain from these provisions that a county warrant is a wholly different thing from the certificate of indebtedness provided for by the constitutional amendment of Section 8 of Article VII. It is also perfectly plain that these certificates of indebtedness are negotiable in form.

Moreover, the authorities are uniform to the effect that such a certificate as was here given is in form a negotiable instrument.

In *School District* v. *Hall* (1895), 113 U. S., 135, the court said:

> "The decisions of this court are numerous to the effect that municipal bonds in the customary form, payable to bearer, are commercial securities, possessing the same qualities and incidents that belong to what are strictly promissory notes negotiable by the law merchant. There is no reason why such bonds, issued under the authority of law, and made payable *to a named person or order*, should not, after being indosed in blank, be treated by the courts as having like qualities and incidents. That they are so treated by the commercial world cannot be doubted."

The following cases also hold that certificates having the characteristics possessed by the one here involved are negotiable in form:

City of Cripple Creek v. *Adams*, 36 Colo., 320.
Humboldt Township v. *Long*, 92 U. S., 642.
Gelpcke v. *Dubuque*, 1 Wall., 175.

IV.

THE RULING OF THE CIRCUIT COURT OF APPEALS UPON THE NECESSITY OF AN EXCEPTION TO THE SUSTAINING OF THE DEMURRER TO THE THIRD DEFENSE, WHILE IMMATERIAL IN THE CASE, IS YET JUSTIFIED BY THE AUTHORITIES.

The petitioner has mistaken the question. It argues in its brief the question as to whether upon the sustaining of a demurrer to a single plea upon which plea the party pleading it stands, and which ruling upon the demurrer eventuates in a judgment, requires a bill of exceptions or an exception on the record to be made in order that

it may be reviewed. We readily concede that such an error is apparent on the record and needs no exception for its review upon error. The question here is totally different. It is whether an exception ought to be entered on the record to the sustaining of a demurrer to one of several pleas where the action proceeds to trial upon the other pleas and the same evidence that could have been offered under the plea to which the demurrer is sustained could have been offered under some other plea upon which the court proceeds to trial.

The petitioner in its brief states a great deal of matter which is not only bad law but is very bad legal history. It is not disputed that since the statute of Westminster II. there have been two records, one the common law record, the other the statutory record provided for by the statute of Westminster II. But to say that the bill of exceptions for reserving exceptions as to evidence and instructions dates from the statute of Westminster II. is, historically speaking, absurd. At that early period of 1285 we find a court where there were no written pleadings made up and filed prior to the trial. The term demurrer was unknown in the law but the sufficiency of every pleading was passed upon by the court before any entry as to that pleading was made on the record. The clerk of the court made the record and entered the pleadings after they had been adjudged good. A cursory reading of the Year Books of that time shows that objections were made then as they are now, first, to the writ, either by matter of law or by matter of fact; then to the statement of the plaintiff's case, either by matter of law in abatement, because of a variance from the writ, or by matter of law to the merits of the plaintiff's claim, or by matter of fact to the merits of the plaintiff's claim. The objection to any pleading was

taken orally in court and was called an exception (exceptio), a term borrowed from the canon law, as based on the Roman civil law. If the objection was held bad it never appeared on the record at all. If held good, either the writ was quashed or judgment was given by the court, as the case might be. The clerk of the court made up the record, and the objection was shown on the record as an exception sustained and judgment thereon. Since if held bad the objection never appeared on the record at all, but if held good it always resulted in a judgment in that particular action, it is plain that every objection in point of law, *i. e.*, our demurrer, was apparent on the record. The objection held bad never appeared on the record because every such exception was waived by pleading higher matter. Hence if a man pleaded matter of fact to a count or declaration he waived the exception of matter of law.

Now it is not disputed that since the date of the statute of Westminster II., and long before that, as shown by Bracton's Note Book, an exception either to the writ or to the count or declaration, or to the plea, for matter of law, which was held good, and which eventuated in the judgment and was the ground of the judgment, never required any exception at all on the record. But at that time there was no jury trial. The jury did not hear evidence. Their verdict was the evidence in the case. They performed the witness function themselves. There could not be any exceptions to the admission or rejection of evidence. The rules of evidence were unknown. Instructions to the jury, in the sense of instructions to them as a judicial body passing upon the facts, were unknown, and as to all matters of pleading, if the case got to an issue of fact to be submitted to an assize, or to an assize turned into a jury by consent, no question or ruling

as to the sufficiency of any pleading could appear on the record at all. It was theoretically and practically impossible until centuries had passed and the motion in arrest of judgment was invented.

But later after two hundred years, when the jury became a judicial body and heard the evidence of witnesses, after it had become the custom to file written pleadings, the same exceptions remained to the proposed pleadings, but the exception to the sufficiency of any pleading in point of law came to be named a demurrer, taken from the old phrase for a postponement or delay upon the making of an exception that "the parol demurs," *i. e.*, that the pleading waits.

But the rule still remained that a demurrer was to the merits of the pleading in point of law, and superseded and waived every prior objection, and the plea of matter of fact to the merits waived the objection by demurrer in point of law to the merits. Nevertheless, if a party demurred to the declaration, his demurrer, still an exception, if held good ended the action, but if held bad judgment went against him. In either case the demurrer eventuated in a judgment. The existence of written pleadings not passed on preliminarily by the court, had superseded the old rule of first trying your point with the court to see whether it was good or bad; now a party demurred at his peril.

Under this procedure it is apparent that any demurrer, either to a plea or to the declaration, ended the action one way or the other. The party was not permitted to choose whether he should first take issue upon point of law, and if that went against him, then take issue on point of fact.

In process of time came modifications. First came the rule that the general demurrer at any stage would be

carried back to the first bad pleading and judgment given accordingly. Of course, no exception on the record was needed because the ruling ended the action by a judgment and the demurrer eventuated in and was the sole ground of the judgment.

Next came the modification of allowing several counts in the declaration with the probable requirement of separate pleas to the separate counts, and finally also came the statutory modification of allowing several distinct pleas to the same count of the declaration. Judgment could now no longer be given either upon the overruling or sustaining of a demurrer unless the demurrer was of such a character that it ended the case and eventuated in a judgment. If the demurrer was sustained to one of several counts it could no longer end the action. The case proceeded on the other counts. And if the demurrer was sustained to a particular plea it no longer ended the action because the cause proceeded upon the other plea or pleas to trial.

But the rule remained that by pleading matter of fact after a demurrer overruled, the exception as to the overruling of the demurrer was waived and the exception was no less waived by amending after demurrer sustained. It was only when the party stood upon his demurrer that the ruling was of any moment, and there came also the further ruling that if one of the pleas pleaded was the general issue which puts in issue the whole declaration, the demurrer could not be carried back to the declaration over the general issue. And since any specific plea traversing a material allegation of the declaration was demurrable as amounting to the general issue, the consequence was that the demurrer could not be carried back to the declaration except in case of a special plea in bar.

In this situation it still remained true that a demurrer

upon which, as either sustained or overruled, judgment was given by the refusal of the party to plead further, no exception was needed or required, because the ruling upon the demurrer was the sole ground of the judgment and so showed upon the face of the record.

Confining now the consideration of this matter to the case of demurrers to pleas to a declaration, if the demurrer did not end the action but left it to proceed on issues raised by another plea or other pleas, the situation that could arise was as follows:

If the demurrer was overruled the plaintiff demurring might take leave to plead matter of fact in reply to the plea or might join issue upon it and the ruling on the demurrer was thereby waived. But if the demurrer to the plea was sustained the defendant might stand on his demurrer and refuse to plead further. If he did, that particular line of issue was ended but if the action proceeded to trial on other issues the ruling upon the demurrer might or might not be material, depending upon whether material evidence was excluded upon the trial.

If the demurrer was sustained to one of several pleas it would result always, in case the general issue was pleaded or another separate plea was pleaded that the case would proceed upon the other plea, and if the party to whose plea the demurrer was sustained desired to stand upon that particular plea which was held bad, it became customary to enter an exception to the ruling upon the record, not by bill of exceptions but written on the record by the clerk in order to show that the party stood upon his plea. But in such a case, if the evidence admissible under the particular plea was admissible under some other plea, the party whose plea was held bad must nevertheless introduce upon the trial his evidence under his other plea, and test the whole qustion either

by a demurrer to evidence, or as we say now, a motion for an instructed verdict, or if the defect was matter of law apparent upon the common law record, by a motion in arrest of judgment, or by a motion for judgment *non obstante veredicto*, and this is the genesis of the rule that the party must except on the record to a ruling sustaining a demurrer to one of several pleas and of the further rule that the sustaining is immaterial if there is some other plea under which the evidence can be admitted, and it was never permitted to a party to play fast and loose with the court and to refuse to introduce evidence when he had a clear chance under his pleading to introduce it upon the trial.

Now therefore it is apparent why the rule is as it is, namely, that a demurrer to a plea which eventuates in a judgment and is the basis of the judgment, requires no exception upon the record, while a demurrer to a plea which is not the basis of a judgment and does not eventuate in a judgment does require an exception upon the record, because it is the way in which a party announces that he intends to stand by that plea and that plea, if stood by, will avail him if by reason of the demurrer to the plea being sustained he is precluded from offering material evidence upon the trial.

The basic reason for the rule evidently is that in the case of a demurrer eventuating in a judgment the error if any, is apparent, while in the other case of a demurrer to a plea sustained where the case proceeds to trial, the proceedings on the trial may have rendered the whole matter immaterial. Hence in regard to such a claimed error the party alleging error must show first his exception and second prejudice upon the trial by the exclusion of evidence admissible under the particular plea held bad.

That this is the rule has been recognized by this court in *German Alliance Insurance Co.* v. *Hale*, 219 U. S., 307, where the court points out the necessity of an exception to the sustaining of a demurrer to a plea where the case proceeds to trial upon other pleas. And there the court shows the further rule that the ruling on demurrer as to that particular plea becomes immaterial if it does not prejudice on the trial.

Any other rule would make a trial of an action a mere game where a party could sit by with evidence decisive of the action and refuse to offer it when he had a clear chance to do so, because at some anterior stage of the case a judge had ruled upon a pleading which was not material to the case and the judge, at the time of ruling, had relied upon the fact that upon the trial the same question would come up upon the matter of evidence, and that the party could then test the point of law when the evidence was in.

The authorities cited by the petitioner upon this question really establish the rule as stated above. The case of *Rogers* v. *City of Burlington*, 3 Wall., 654, states the exact point where it is said:

> "It is well settled that the ruling of the Circuit Court in sustaining or overruling a demurrer to a declaration *and rendering judgment for the wrong party*, may be re-examined in this court by writ of error without any formal bill of exceptions."

This is precisely the point. Where the ruling upon the demurrer results in the rendering of judgment for one party or the other and is the basis of the ruling, the demurrer is itself the sole ground of the judgment and from the earliest days no exception was required.

The case of *Suydam* v. *Williamson*, 20 How., 427, is carefully confined to a demurrer sustained to a material portion of the pleadings, and it is apparent that the court

is speaking of a demurrer which eventuates in a judgment.

The case of *Gorman* v. *Lennox*, 15 Pet., 115, concerns a plea of performance filed to a declaration on a replevin bond. The cause was tried on a plea of set off and after verdict for the plaintiff the demurrer was sustained to the plea of performance. The court said:

> "The demurrer to the plea of general performance seems not to have been decided until after the verdict was rendered. As this plea was clearly bad, the demurrer was very properly sustained by the court.
>
> "A demurrer being filed, the rule is that the party who has committed the first fault shall have judgment against him. And on this demurrer a question is raised as to the sufficiency of the declaration."

The court then holds the declaration sufficient.

In that case on the trial all evidence of the defendant under the plea of set off was excluded, so that the sole question was an assessment of damages under the declaration for want of a sufficient plea. Therefore the case was the same as if the plea of performance were the sole plea, demurrer sustained, and judgment for plaintiff for the penalty of the bond to stand as security for satisfaction of the amount of damages to be assessed by the jury. In other words it is a case of judgment upon demurrer sustained, where no exception is necessary.

The case of *Aurora* v. *West*, 7 Wall., 82, was a suit upon coupons of bonds for a sum certain and demurrer to rejoinder to replication to a plea, where the demurrer was sustained. Also there was a demurrer to the tenth replication overruled. To the tenth replication after demurrer overruled, no rejoinder was filed but the cause was left on the pleading with a demurrer overruled and no further pleading filed by defendants. The court say:

> "Statement in the bill of exceptions is, that the parties submitted the case to the court and upon the

record therein set forth; but it is obvious that, when it was submitted, there was nothing left to be done except to compute the damages."

And again the court says:

"Every issue of fact having been withdrawn, and every issue of law in which the other pleadings terminated having been decided in favor of the plaintiffs, they were clearly entitled to judgment on the first count. Irrespective, therefore, of the bill of exceptions, the writ of error brings here for review the decisions of the court below in overruling the demurrer of the defendants to the tenth replication of the plaintiffs and in sustaining the demurrer of the plaintiffs to the rejoinder of the defendants as filed to the first, second, fifth, sixth and eighth replications of the plaintiffs.

"Such being the state of the case the decisions of the court below may be re-examined in this court without any bill of exceptions, as the questions are apparent in the record, and arise upon material pleadings on which the cause depends."

We say then that here is another case of a demurrer where the ruling upon demurrer without more forms the sole reason of the judgment. No exception of course was necessary.

The case of *Mitsui* v. *St. Paul, etc., Ins. Co.*, 202 Fed., 27, 29, decides on the authority of *Teal* v. *Walker*, 111 U. S., 242, that the general demurrer to a declaration is not waived by pleading over after the demurrer is overruled, and that the objection that the declaration fails to state a cause of action and clearly shows that plaintiff cannot recover may be assigned for error without saving an exception to the ruling upon demurrer. This also must be true for such an error inheres in the record and is not waived. It can be raised by motion in arrest of judgment or by motion for judgment *non obstante veredicto.* So here if the defendant had filed a general demurrer which had been overruled and then he had pleaded over,

he could now argue the point of no power in the defendant to issue the paper and its void character under the law.

V.

THE POINT RAISED BY THE DEMURRER TO THE THIRD DEFENSE WAS IMMATERIAL IN ANY EVENT, SINCE THE SAME QUESTION WAS RAISED BY THE SECOND DEFENSE. THEREFORE THE RULING OF THE CIRCUIT COURT OF APPEALS THAT AN EXCEPTION WAS NECESSARY TO PRESERVE THE RULING ON THE DEMURRER LIKEWISE IS IMMATERIAL.

We already have stated at some length the theory upon which was predicated each of the defendant's three statements of defense; that the second defense alleged both failure of consideration and plaintiff's non-ownership of the certificate; and that the third defense alleged only failure of consideration. It is apparent, therefore, that in no view of the case was the defendant prejudiced by the ruling on the demurrer to the third defense. Since the same defense was presented squarely by the second statement of defense, upon which the defendant went to trial, the ruling on the demurrer to the third defense clearly became immaterial.

Assuming that the third statement of defense stated a tenable defense—which presumably it would have if the certificate had been in law or in fact non-negotiable—the second statement of defense was good upon precisely the same theory. In that case the allegation whereby the bona fide character of plaintiff's ownership was negatived would have been surplusage, and would not have affected the validity of the other distinct defense urged.

It has been decided in the case of *Chambers County* v. *Clews*, 21 Wall., 317, that where a demurrer to a plea was wrongly overruled, the error was a harmless one if

the defendant had another plea which covered the same ground and presented the same issue. Now, in this case the second defense and the third defense were in identical words so far as the third defense went. All the evidence that could have been offered under the third defense was admissible and could have been offered under the second defense, but the defendant offered no evidence whatever under its second defense. The defendant did not attempt to substantiate any part of that second defense, but it did rely as it now says, upon the same issue of law precisely that it relied upon on the argument of the demurrer to the third defense, namely, that there was no power to issue negotiable certificates and they were, therefore, void. It is too plain for words that the ruling upon the demurrer did not prejudice the defendant in any way, because the only point which it desired to make, it raised upon the trial but now in this court it waives the claimed errors committed and the exceptions taken upon the trial. To the same effect as the case last cited are the cases of *Grand Chute* v. *Winegar*, 15 Wall., 355, and *German Alliance Insurance Co.* v. *Hale*, 219 U. S., 307.

The court in passing upon the third defense might very well have said that all that was in the third defense was in the second defense and the ruling here will make no difference since the defendant under its second defense can offer all the evidence which it claims, and if it has such evidence, can then raise the law point upon the trial by the necessary implication from a motion for an instructed verdict. As a matter of fact the same point was raised on the trial and the ruling upon the demurrer was therefore in the judgment of the court wholly immaterial.

The Circuit Court ruled that the plaintiff gave evidence

in support of its cause of action which, in the absence of proof by the defendant sustaining its second defense, even if the instrument was not negotiable, would entitle the plaintiff to recover. This means that the defendant deliberately took its chances upon the trial. It offered no evidence whatever. It made no effort to show any failure of consideration, as it could have shown under its second defense if it had the evidence. It was in no way circumscribed in the proof which it could offer, because everything admissible under the third defense was admissible under the second defense. Under the petitioner's then claim as to the law, as soon as the defendant proved failure of consideration under its second defense, it was entitled to a verdict, even if the paper was in the hands of a bona fide indorsee for value, if their contention under their third defense was sound. Under the petitioner's claim now, the defendant had to prove nothing. The paper was void on its face. Having deliberately chosen not to prove its second defense to any extent, it chose to rely upon its motion for a directed verdict or its motion for a non-suit.

The defendant, having deliberately chosen its own course and now having waived any errors in the rulings made on the trial and saved by its bill of exceptions, certainly cannot go back to an immaterial ruling upon a demurrer.

VI.

Conclusion.

We have felt it our duty to show that the decision of the Circuit Court of Appeals was sound, and incidentally to vindicate its ruling upon a particular point of appellate practice. We have also shown that according to the record the argument as to the void character of the paper

probably was not presented in the trial court, since it contradicts the whole theory of the defense. We have also shown that the errors which by possibility might raise the point are waived in this court. But, these questions aside, we place full reliance upon the proposition first argued, that there was power in the municipal authorities to issue the paper sued on, negotiable in form and clothed with all of the attributes usually possessed by negotiable paper.

We respectfully submit therefore, that the judgment of the Circuit Court and of the Circuit Court of Appeals is right and should be affirmed.

Respectfully submitted,

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APPENDIX.

Section 8 of Article VII of the Constitution of Colorado, as amended in 1906, reads as follows:

> "When the governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, shall adopt and purchase a voting machine, or voting machines, such governing body may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from date of issue, as may be determined, but shall not be issued or sold at less than par."

Section 2342 of the Revised Statutes of Colorado of 1908, provides as follows:

> "The governing body of any county, city, city and county or town, including the city and county of Denver, and any city, city and county or town which may be governed by the provisions of special charter, adopting and purchasing a voting machine, or voting machines, may provide for the payment therefor by the issuance of interest-bearing bonds, certificates of indebtedness or other obligation, which shall be a charge upon such county, city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time, or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par."

Section 6 of Article XI, Colorado Constitution, is as follows:

> "Section 6. No county shall contract any debt by loan in any form except for the purpose of erecting necessary public buildings, making or repairing pub-

lic roads and bridges; and such indebtedness contracted in any one year shall not exceed the rates upon the taxable property in such county following, to-wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof; and the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this Constitution, shall not at any time exceed twice the amount above herein limited, unless when, in manner provided by law, the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debt so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned; *Provided*, That any county in this state which has an indebtedness outstanding, either in the form of warrants issued for purposes provided by law prior to December 31, A. D. 1886, or in the form of funding bonds issued prior to such date for such warrants previously outstanding, or in the form of public building, road or bridge bonds outstanding at such date, may contract a debt by loan by the issuance of bonds for the purpose of liquidating such indebtedness, provided the question of issuing said bonds shall, at a general or special election called for that purpose, be submitted to the vote of such of the duly qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed in such county, and the majority of those voting thereon shall vote in favor of issuing the bonds. Such election shall be held in the manner prescribed by the laws of this state for the issuance of road, bridge and public building bonds, and the bonds authorized at such election shall be is-

sued and provision made for their redemption in the same manner as provided in said law."

Section 934, Mills' Annotated Statutes, is as follows:

"934. Debt for Roads, Bridges—Election—Proceedings—Canvass of Election—Aggregate Amount. When the county commissioners of any county shall deem it necessary to create an indebtedness for the purpose of erecting necessary public buildings, making or repairing public roads or bridges, they may, by an order entered of record specifying the amount required and the object for which such debt is created, submit the question to a vote of the people at a general election; and they shall cause to be posted a notice of such order in some conspicuous place in each voting precinct in the county, for at least thirty days preceding the election, and all persons voting on that question shall vote by separate ballot, whereon is placed the words 'for county indebtedness,' or 'against county indebtedness'; such ballots to be deposited in a box provided by the county commissioners for that purpose; and no person shall vote on the question of indebtedness unless he shall have the necessary qualifications of an elector as provided by law, and shall have paid a tax upon property assessed to him in such county for the year immediately preceding; and if, upon canvassing the vote (which shall be canvassed in the same manner as the vote for county officers), it shall appear that a majority of all the votes cast are for county indebtedness, then the county commissioners shall be authorized to contract the debt in the name of the county; *Provided*, That the aggregate amount of indebtedness of any county, exclusive of debts contracted prior to July first, 1876, in which the assessed valuation of property shall exceed one million of dollars, for all purposes, shall not be in excess of the following ratio, to-wit: counties in which the assessed valuation of property shall exceed five millions of dollars, six dollars on each thousand dollars thereof; counties in which the assessed valuation of property shall be less than five millions, and exceed one million of dollars, twelve dollars on each thousand dollars thereof. (G. L. '77, p. 223, sec. 448; G. S. '83, pp. 286, 287, sec. 671.)"

Section 935, Mills' Annotated Statutes, is as follows:

"935. County Commissioners May Issue Bonds—Limitations — Interest Tax — Redemption Funds. The county commissioners, when authorized as provided in section twenty-one of this act, shall make and issue coupon bonds of the county, not exceeding the amounts specified in the preceding section, in counties which have an assessed property valuation exceeding one million dollars, payable at the pleasure of the county ten years after the date of their issuance, but absolutely due and payable twenty years after such date, bearing interest at the rate of not exceeding ten per cent per annum from their date until paid, said interest payable on the first day of April of each year, or semi-annually on the first day of April and first day of October in each year; such interest and principal, when due, to be payable at the office of the county treasurer of the county, or in New York City, at the option of the holders of the bonds; and the county commissioners shall prescribe the form of said bonds, and the coupons thereto, and to provide for the interest accruing on the bonds, they shall levy annually a sufficient tax to fully discharge such interest; and for the ultimate redemption of such bonds, they shall levy annually, after ten years from the date of such issuance, such tax upon all taxable property in their county as shall create a yearly fund equal to ten per cent of the whole amount of such bonds issued; and all taxes for interest on and the redemption of such bonds shall be paid in cash only, and shall be kept by the county treasurer as a special fund, to be used in the payment of interest on and redemption of such bonds only; such taxes to be levied and collected as other taxes. (L. '89, p. 103, sec. 1, amending G. S. '83, sec. 672; G. L. '77, p. 224, sec. 449.)"

Section 801, Mills' Annotated Statutes, is as follows:

"801. How Claims Against County Shall Be Presented and Paid—Forms of Warrants—Limitations. All claims and demands held by any person against a county shall be presented for audit and allowance to the Board of County Commissioners of the proper county, in due form of law, before an action in any

court shall be maintainable thereon, and all claims, when allowed, shall be paid by a county warrant or order, drawn by said board on the county treasury, upon the proper fund in the said treasury, for the amount of such claim. Such warrant or order shall be signed by the chairman of the board, permanent or temporary, attested by the county clerk, and when presented to the county treasurer for registry, be countersigned by him; said warrant or order shall specify the amount and value of the claim or service for which it is issued, and be numbered and dated in the order in which it is issued. The general county fund shall be known and designated on the books of the county treasury as the 'ordinary county revenue fund,' and the general road fund shall be known and carried on the books of said county treasury as the 'road purposes revenue fund.' Such warrants and orders, payable on demand, shall hereafter be drawn and issued upon the county treasurer, or against any funds in his hands, only when at the time of drawing and issuing the same there shall be sufficient moneys in the appropriate fund in the treasury to pay such warrants and orders. Whenever there are no moneys in the county treasury of a county to the credit of the proper fund to meet and defray the necessary expenses of the county, it shall be lawful for the Board of County Commissioners of such county to provide that county warrants and orders of such county may be drawn and issued against and in anticipation of the collection of taxes already levied for the payment of such expenses, to the extent of eighty per cent of the total amount of the taxes levied; *Provided,* That warrants and orders so drawn and issued, under the provisions of this section, shall show upon their face that they are payable solely from the fund upon which the same is drawn, and the taxes levied to form the same when collected, and not otherwise. County warrants and orders may be in such form as the county commissioners may provide, and may be made payable to the order of the payee, or to the bearer. The person or persons to whom such last-named warrants and orders shall be allowed and delivered shall be held to have accepted the same in full payment and satis-

faction of the claim, to pay which the same was issued, and the obligation of said warrants is hereby limited as stated, and said warrants shall be paid only by, through and from the fund drawn upon, and the collected and uncollected taxes levied, appropriated, collected or paid into the county treasury to create, constitute and form said fund, and the taxes provided by law therefor shall be covered into said fund until all warrants drawn shall be fully paid, satisfied and discharged, both principal and interest. Said limited and last-named warrants and orders shall not operate as a debt of said county, and shall not be held to add to or increase the debt or indebtednss of said county; *Provided,* That the provisions of this law shall in no wise affect the lawful warrants and orders of any county which were issued prior to the passage of this law, and are outstanding and unpaid, but such warrants, unless redeemed under the funding statute, shall first be paid, both principal and interest, in the order of their registry. (L. '87, p. 241, sec. 2, amending G. S. '83, sec. 546; G. L. '77, p. 229, sec. 463; see R. S. '68, p. 171, sec. 25.)"

BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER *v.* HOME SAVINGS BANK.

WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 126. Argued January 15, 1915.—Decided January 25, 1915.

No exception or bill of exception is necessary to open a question of law apparent on the record where the record shows no waiver of rights of plaintiffs in error. *Nalle* v. *Oyster*, 230 U. S. 165.

When a municipality is authorized to raise money by sale of bonds this court will take it that the authority extends to putting the bonds in the form that would be necessary to obtain a purchaser. And this applies also to certificates of indebtedness.

There is no essential difference between bonds of a municipality and its certificates of indebtedness, and in this case *held* that the purchasers for value before maturity and in good faith of negotiable certificates of indebtedness of the City of Denver were entitled to recover, and the defense that the authority to issue certificates did not authorize making them negotiable could not be maintained.

200 Fed. Rep. 28, affirmed.

THE facts, which involve the validity of certificates of indebtedness issued by the City and County of Denver in payment for voting machines, are stated in the opinion.

Mr. Charles R. Brock, with whom *Mr. I. N. Stevens*, *Mr. Milton Smith* and *Mr. William H. Ferguson* were on the brief, for petitioner:

An exception to the ruling of the trial court upon a demurrer is not a condition precedent to the right to have that ruling reviewed upon writ of error, and such an exception is unauthorized by any rule at common law or in the Federal courts. *Barnes* v. *Scott*, 11 So. Rep. 48; 3 Blackstone, p. 372; *Chateaugay Ore Co., Petitioner*, 128

U. S. 544; *Manning* v. *German Ins. Co.*, 107 Fed. Rep. 52; *Consumers Oil Co.* v. *Ashburn*, 81 Fed. Rep. 331; *Aurora* v. *West*, 7 Wall. 82; *Clune* v. *United States*, 159 U. S. 590; 1 Coke upon Littleton, § 155b, note; *Doty* v. *Jewett*, 19 Fed. Rep. 337; 3 Ency. Pl. & Pr., pp. 378, 404; *Francisco* v. *Chi. & Alt. R. R.*, 149 Fed. Rep. 354; *Ghost* v. *United States*, 168 Fed. Rep. 841; *Hanna* v. *Maas*, 122 U. S. 24; Hopkins' New Fed. Eq. Rules, p. 10; *Knight* v. *Ill. Cent. R. R.*, 180 Fed. Rep. 368; *Lowry* v. *Mount Adams R. R.*, 68 Fed. Rep. 827; *Mitsui* v. *St. Paul Ins. Co.*, 202 Fed. Rep. 26; *Newport News Ry.* v. *Pace*, 158 U. S. 36; *Potter* v. *United States*, 122 Fed. Rep. 49; *Preble* v. *Bates*, 40 Fed. Rep. 745; *Pickett* v. *Legerwood*, 7 Pet. 144; *Railway Co.* v. *Heck*, 102 U. S. 120; Rev. Stat., § 953; Rule 4, Supreme Court U. S.; Rule 10, U. S. C. C. App.; *Rogers* v. *Burlington*, 3 Wall. 654; Statute of Westminster, 2, 13 Edw. I, c. 31; Stephen on Pleading (Tyler's ed.), p. 142; *Suydam* v. *Williamson*, 20 How. 427; *Tullis* v. *Lake Erie & W. Ry.*, 105 Fed. Rep. 554; *Webb* v. *National Bank*, 146 Fed. Rep. 717.

As respects the power or authority of the Board of County Commissioners of the City and County of Denver to issue negotiable certificates of indebtedness, see Const., Colorado, Art. VII, § 8; Rev. Stats., Colorado, 1908, § 2341; Sess. Laws, Colorado, 1905, p. 222.

Neither § 8 of Art. VII of the constitution of Colorado, nor the act of 1905, authorizes the Board of County Commissioners of the City and County of Denver to issue negotiable certificates of indebtedness, and the certificate and coupon sued upon, being negotiable in form, are therefore absolutely void. *Barnett* v. *Denison*, 145 U. S. 135; *Brenham* v. *Bank*, 144 U. S. 173; Const. of Colorado, Art. VII, § 8; *Coffin* v. *Commissioners*, 57 Fed. Rep. 139; *German Ins. Co.* v. *Manning*, 95 Fed. Rep. 597; *Hedges* v. *Dixon Co.*, 150 U. S. 182; *Mayor* v. *Ray*, 19 Wall. 468; *Merrill* v. *Monticello*, 138 U. S. 673; *National*

Bank v. *School District*, 56 Fed. Rep. 197; *Nashville* v. *Ray*, 19 Wall. 468; *Ottawa* v. *Carey*, 108 U. S. 110; Rev. Stat. Colorado, 1908, § 2342; Session Laws Colorado, 1905, p. 224; *Swanson* v. *Ottumwa*, 131 Iowa, 547; *West Plains* v. *Sage*, 69 Fed. Rep. 943.

Even if the constitutional provision and statute in question should be held to authorize the issuance of negotiable bonds, the security sued on in this action is not a bond, is not negotiable, and therefore the plaintiff took it subject to any equities existing between the county and the payee. 2 Dillon on Municipal Corporations, 5th ed., pp. 1273–1295; *Nashville* v. *Ray*, 19 Wall. 468; *Watson* v. *Huron*, 97 Fed. Rep. 449; *West Plains* v. *Sage*, 69 Fed. Rep. 943.

Mr. John M. Zane, with whom *Mr. Charles F. Morse* and *Mr. Charles W. Waterman* were on the brief, for respondent.

Mr. Justice Holmes delivered the opinion of the court.

This is an action brought by the respondent upon a certificate of indebtedness and an interest coupon attached to the same, against the petitioner. There was a verdict and judgment for the plaintiff and the Circuit Court of Appeals affirmed the judgment. 118 C. C. A. 256; 200 Fed. Rep. 28. The plaintiff held the instrument by endorsement and was found to have purchased it in good faith before maturity, but the defendant denied the authority to issue the certificate in negotiable form and sought to raise the question by its third defence which set up failure of consideration. There was a demurrer to this defence which was sustained by the Circuit Court, and the trial took place upon the other issues. The Circuit Court of Appeals declined to consider the correctness of this ruling because no exception was taken to it. But

no exception or bill of exceptions is necessary to open a question of law already apparent on the record and there is nothing in the record that indicates a waiver of the defendant's rights. Therefore we must consider the merits of the defence. *Nalle* v. *Oyster*, 230 U. S. 165.

The certificate recites the allowance of a claim for ballot machines by the Board of County Commissioners of the City and County of Denver and goes on "the Board of County Commissioners being authorized thereto by the laws of the State of Colorado, Act of 1905, thereby issues its certificate of indebtedness for the said sum, and will in one (1) year pay to the order of the Federal Ballot Machine Company the sum of eleven thousand two hundred and fifty dollars, with interest on this sum, from the date hereof, at the rate of five per cent. per annum; the said interest payable semi-annually, as per two (2) coupons, hereto attached." This certificate was one of ten issued to provide for the payment for ballot machines and the constitution of the State authorized provision for payment in such case "by the issuance of interest-bearing bonds, certificates of indebtedness, or other obligations, which shall be a charge upon such city, city and county, or town; such bonds, certificates or other obligations may be made payable at such time or times, not exceeding ten years from the date of issue, as may be determined, but shall not be issued or sold at less than par." Art. VII, § 8, as amended, November 6, 1906. A statute in like words previously had been passed to be effective if the amendment to the constitution should be adopted as it was. Laws of 1905, c. 101, § 6. See Rev. St. 1908, § 2342. The defence that we are considering is that the foregoing words did not warrant making the certificates of indebtedness negotiable, relying especially upon *Brenham* v. *German American Bank*, 144 U. S. 173. But the argument seems to us to need no extended answer. The power to issue certificates of indebtedness or bonds is given in terms and

it is contemplated that these instruments may be sold to raise money for the purpose named. But however narrowly we may construe the power of municipal corporations in this respect, when they are authorized to raise money by the sale of bonds we must take it that they are authorized to put the bonds in the form that would be almost a necessary condition to obtaining a purchaser—the usual form in which municipal bonds are put upon the market. *Gunnison County Commissioners* v. *Rollins*, 173 U. S. 255, 276. What is true about bonds is true about certificates of indebtedness. Indeed it is difficult to see any distinction between the two as they are commonly known to the business world. The essence of each is that they contain a promise under the seal of the corporation, to pay a certain sum to order or to bearer. We are of opinion that the Board of County Commissioners was authorized to issue certificates in the negotiable form. *Carter County* v. *Sinton*, 120 U. S. 517, 525. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 203. *Cadillac* v. *Woonsocket Savings Institution*, 58 Fed. Rep. 935, 937. *Ashley* v. *Board of Supervisors*, 60 Fed. Rep. 55, 67. *D'Esterre* v. *Brooklyn*, 90 Fed. Rep. 586, 590. Dillon, Munic. Corp., 5th Ed., § 882.

Judgment affirmed.